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TENURE OF OFFICE UNDER THE
CONSTITUTION

A STUDY IN LAW AND PUBLIC POLICY

TENURE OF OFFICE UNDER THE CONSTITUTION

A STUDY IN LAW AND PUBLIC POLICY

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PREFACE

This volume is the expansion of a paper read before the round table on administrative law, under the leadership of Professor John Dickinson, then of Princeton University, at the Chicago meetings of the American Political Science Association, held in December, 1928. That paper was published in the *American Political Science Review* for August, 1929, under the title "The Bearing of *Myers v. United States* Upon the Independence of Federal Administrative Tribunals."

The present work seeks to elaborate the theses of the original paper, and especially to emphasize the point of view from which the subject has been approached. In primary aim, it is a study in politico-legal processes from the point of view represented by John Dewey in logic, philosophy, ethics and politics, and by Mr. Justice Holmes and W. W. Cook in law. It is not unrelated to the sociological jurisprudence of Dean Pound, and his theory of the judicial process as one of "social engineering"; to what Judge Cardozo has emphasized as the "sociological method"; and to various other currents in contemporary thought. All these currents, however, head up in the instrumental logic of Dewey, and, on the legal side, in the application of this logic to legal analysis, which is represented by Cook. To the latter the

writer is indebted in personal ways that do not appear in the footnotes.

Among the postulates upon which the writer will proceed are the interdependence of the social sciences; the value of the scientific method in the application of governmental policies; and the importance of the "judicial approach" to the adjustment of interest-claims. As illustrating the first, the sociological definition of institutions as "blocks of adjustments" has been applied, and the psychological aspects of the problem involved in independence of tenure have been emphasized.

J. H.

BALTIMORE,

April 22, 1929.

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INTRODUCTION

THE PROBLEM

The last two decades have witnessed a rapid multiplication of federal boards and commissions which are outside the ten great executive departments. We now have, for example, besides the older Civil Service and Interstate Commerce Commissions, the Federal Reserve Board, the Federal Trade Commissions, the United States Tariff Commission, the United States Shipping Board, the Federal Power Commission, the Inland Waterways Commission, the Federal Radio Commission, and the Federal Farm Board.

The primary purpose of this essay is to present a case for some independence of tenure for these commissions and certain other governmental agencies which will be listed. This will entail the development of the following theses:

1. The desirability, from the standpoint of political science, of guaranteeing such independence of tenure.

2. The desirability of promoting such guarantee through legal restraints upon the President's power of removal.

3. The obvious conclusion, 1 and 2 being granted, that Congress should be able to place upon presidential power such restraints as a matter of legislative policy.

4. A constitutional argument in favor of the validity of such congressional legislation.

The essay will thus fall into three parts. In Part I we shall, with special reference to regulatory commissions, explain the expediency of making these agencies independent. Suffice it to say at this point that the creation of these extra-departmental bodies marks one of the most significant developments in federal legislative policy which has taken place in the last quarter-century. This development grows out of the expansion of federal authority which the new economic system of the twentieth century—for such indeed it is—has entailed. It is a serious effort to adapt a governmental system set up in the eighteenth century to the economic régime of the twentieth. It is our intention to demonstrate that the success of this effort depends upon the independence of the regulatory and other bodies involved.

In Part II we shall present arguments in favor of having legal measures to that end, as opposed to dependence upon constitutional *mores* alone. These points being established, it follows, as a matter of method under our political system, that Congress be allowed to determine which of these agencies shall be made independent of the the power of removal.

However, we are faced at this point by the case of *Myers v. United States*, in which the Supreme Court held invalid a statute of Congress which attempted to limit the President's removal power, and indicated in the majority opinion that this power,

with reference to officers appointed by him, is in all respects illimitable. Part III, therefore, will constitute the elaboration of a constitutional theory of the removal power which will allow Congress wide discretion in determining the conditions of tenure of the officers under discussion. This will involve the attempt to show that the Myers case, interpreted in the light of a strict application of the principle of *stare decisis*, does not necessarily preclude the application of the constitutional theory to be set forth.

Parts I and II are thus studies in political science, Part III a sort of brief in constitutional law. Yet, for reasons later to be elaborated, the three subjects are inextricably interrelated, so that the essay really forms an inseparable whole. On that score, we need only say, at this point, that we deal with a problem in law in which the answer depends upon which set of opposing premises we select as the basis of our deductions. In such a case, we submit that it is our duty, and that a court should consciously accept it as its duty, to choose the premises which lead to the consequences which best conform with the accepted opinion on the art of government. This being so, the issue of expediency is really an essential part of our legal brief; while, conversely, the desired consequences cannot be secured unless the constitutional issue be settled in favor of Congress.

THE BROADER ASPECTS

At first glance it might seem that the value of this essay is dependent upon the acceptance by the Su-

preme Court of our constitutional theory. This, we venture to assert, is not true. The permanent contribution of the work is expected to lie in the fact that it illustrates a point of view which is useful both in the attack upon a political problem, and in a critical analysis of the judicial process.

This point of view it is not easy to describe. We shall attempt, during the course of this work, to make it explicit in connection with issues as they arise. At this stage we can merely suggest some of its major aspects. We hesitate, indeed, to give it a descriptive name, because we know that such names are "hot" words,—that they call forth emotional responses of approval or disapproval that confuse the issue.¹

This much we may say: the point of view herein represented cannot be appreciated by one who is not somewhat familiar with the ideas set forth in John Dewey's *Essays in Experimental Logic*. The result of the "new" or instrumental logic has been to revolutionize the scientist's *Weltanschauung*. That result has been stimulated by many modern developments, such as the industrial revolution, the acceptance of the evolutionary hypothesis,² and the recent revolutionary changes in physico-chemical theory.³ But this whole movement in human thought

¹ On the emotive use of word symbols see Ogden and Richards, *The Meaning of Meaning*, pp. 111, 235, and *passim*.

² Cunningham, *Textbook of Logic*, p. 70.

³ See notably, Whitehead, *Science and the Modern World*; Lewis, *The Anatomy of Science*; and Barry, *The Scientific Habit of Thought*.

heads up in the new point of view in logical theory represented by Schiller ⁴ and Dewey.

According to this theory of logic, human thinking is related to some concrete problem growing out of maladjustment in the environment. In this sense the point of view may be called Realistic. Reflection, to be useful, must deal with the raw material of experience and not merely with the logical manipulation of abstract concepts or verbal symbols. Hence, to this extent we are Empiricists, and insist upon a conscious effort not to be misled by the hypostatic fallacy.⁵ This requires some understanding of the Science of Symbolism.⁶ Further, the viewpoint is Pragmatic in its acceptance of the dependence of the "truth" of a proposition upon whether it "works,"⁷ in its insistence that things be defined and judged in the light of their consequences relative to a given purpose.⁸ This involves also acceptance of the Relativity of Truth. From the history of science we learn the necessity of Skepticism as opposed to Dogmatism.⁹ The result is a habit of thought, an attitude, which has in a broad sense of the term been called Scientific.¹⁰

⁴ See his *Formal Logic*.

⁵ Ogden and Richards, *op. cit.*, pp. 99, 133-134, 185, 255, 294; Cunningham, *op. cit.*, p. 403.

⁶ See Ogden and Richards, *op. cit.*

⁷ Ratner, *Philosophy of John Dewey*, chap. VII; Kallen, *Philosophy of William James*, pp. 164-166, 185-193.

⁸ Ratner, *op. cit.*, chap. VII; Ogden and Richards, *op. cit.*, p. 111.

⁹ Barry, *op. cit.*, pp. 49-64.

¹⁰ Barry, *op. cit.*, *passim*.

In giving this brief summary of our point of departure, we may enter a denial of our acceptance of certain beliefs commonly associated with some of the terms we have used. We do not claim that the Pragmatist can in his thinking discard all assumptions. Reflection cannot proceed without assumptions. We agree fully that the test of "working" assumes criteria by which to judge what consequences are "desirable."¹¹ But such criteria are mainly furnished by the dominant habits of thought of the age and place;¹² while fact-judgments and value-judgments are not, as is usually assumed, unrelated and entirely separate. "Facts" are themselves interpretations of data in terms of consequences and for particular purposes.¹³ Hence, in another view, our approach may be described as Functional. "Criteria," indeed, are not to be regarded as fixed norms, but as tools of investigation.¹⁴

Above all, the theory of evolution and the history of human thought show that the process of classification is not a purely objective discovery of sharp and preexisting differences.¹⁵ Classes shade into one another. Classification is, indeed, conditioned by the fundamental fact of the relativity of all thought both

¹¹ Hart, "A Volume Against the Pragmatists," book review in *Virginia Quarterly Review*, October, 1928.

¹² Cf. Whitehead, *op. cit.*, on dominant "climates of opinion" in different scientific eras; pp. ix, xi, 3, 5, 23, 25, 36, 59.

¹³ Barry, *op. cit.*, chap. II.

¹⁴ Dewey, *Human Nature and Conduct*, pp. 238-247, dealing with "The Nature of Principles."

¹⁵ See note 2 above.

to the observer and to the immediate environment which he observes. Nevertheless, writers usually proceed to classify and employ class logic as if their task were to discover what "really" is "true" or what "really" is "right" *per se* or in general. Classification, like definition, is always *ad hoc*—relative to a given purpose.¹⁶ This fundamental fact fixes the limits of Induction and hence of Deduction as means of arriving at empirical truth.¹⁷ Deduction *per se* is only formally valid. Discarding self-evidence or revelation or authority as sources of premises, as the modern scientist does, the inductive method is, unless taken as merely tentative until and unless its results are verified, the sure road to over-generalization¹⁸ and unreal Abstractionism—Rationalism in the bad sense of the term.¹⁹ Such is an inadequate summary of the approach implicit in the modern scientific method at its best.

SOME COROLLARIES

Because a grasp of the broader aspects of this essay is so essential to an understanding of its aims,

¹⁶ Dewey, *op. cit.*, pp. 131 ff.; Ogden and Richards, *op. cit.*, p. 111. Cf. Reeves, *La Communauté Internationale*, chapitre premier.

¹⁷ Cook, "Scientific Method and the Law," in *Johns Hopkins Alumni Magazine*, March, 1927.

¹⁸ Whitehead, *op. cit.*, pp. 34, 60-63.

¹⁹ The reader will be considerate in *not* attributing to us *all* connotations of these terms. Thus, we recognize the place of creative thought, if not of Rationalism in the Platonic sense. See Robinson, *The Mind in the Making*, pp. 48-62; Beard, "Time, Technology, and the Creative Spirit in Political Science," in *American Political Science Review*, February, 1927; Dewey, *op. cit.*, pp. 169-209.

we may briefly list some particular corollaries which will be employed in the body of the work:

1. We shall emphasize the *ad hoc* character of our classifications and definitions.

2. We shall attempt to relate the change, from the acceptance of the dogma of laissez-faire to a sort of pragmatic collectivism, to the environmental changes accompanying the industrial revolution.

3. We shall deal with "government by commission" as a tool for making more effective the organization of the "new publics"²⁰ which the second or American industrial revolution has brought into being, holding that the dominant view of what constitutes a "public interest" fixes the scope and limitations of governmental regulation at a given time.

4. Regarding governmental institutions as from one standpoint "blocks of adjustments,"²¹ we shall picture the recently created federal boards and commissions as means of readjustment to a changing environment, in which the traditional method of "judicial justice" plus occasional, detailed legislation²² no longer "works."

5. We shall attempt to show the advantages of "judicialized,"²³ independent and expert commissions as means for such readjustment, as modifica-

²⁰ Dewey, *The Public and Its Problems*.

²¹ Keller, *Starting Points in Social Science*, chaps. II and VIII.

²² Cf. Hart, *The Ordinance Making Powers of the President*, pp. 265-285, and references there given.

²³ The term is used by Dicey in his discussion of the French administrative courts (*Law of the Constitution*, eighth ed., p. xlv).

tions of a governmental system devised in the eighteenth century to make it better adapted to twentieth century conditions.

6. We shall suggest that the use of this new method may well be extended to functions like the postal service and the audit, as well as to certain fact-finding and business-operating functions.

7. We shall indicate the probable expediency of having the independence of tenure of such agencies guaranteed by law; and shall in this connection consider the political influences recently brought to bear upon the Tariff Commission and the Shipping Board. This will involve some discussion of the relation between the law and the custom of the constitution.²⁴

8. We shall seek to analyze the "logic" of seeking to find out what the Constitution "means" in relation to a topic on which it is silent.²⁵

9. We shall attempt to show that the answer to the constitutional question of the power of Congress to limit the President's power of removal depends upon a choice of competing premises, one set of which must be selected.

10. We shall accept the postulate that, in such a situation, where a choice must be made, the Court should select premises which lead to the socially more expedient consequences²⁶—should, in brief, follow Cardozo's sociological method.²⁷

²⁴ Cf. Dicey, *op. cit.*, pp. 1-34.

²⁵ Cf. Cook, *op. cit.*

²⁶ Holmes, "The Path of the Law," in *Collected Legal Papers*, pp. 167 ff.

²⁷ Cardozo, *The Nature of the Judicial Process*, Lectures II and III.

11. We shall analyze *Myers v. United States* in the light of what we conceive to be the strict and more expedient form of the doctrine of *stare decisis*;²⁸ and shall thus be enabled to repudiate most of the opinion in that case as *dicta*, and to formulate for the case a "rule of decision" which will not be inconsistent with our constitutional theory of the removal power.

12. We shall attack the *Myers* opinion both on general grounds of historical interpretation²⁹ and for committing the fallacy of reification of the concept "the executive power."³⁰

13. From other premises than those of the *Myers* opinion, but which it is equally permissible to read into the Constitution, we shall deduce a competing constitutional theory of the power of removal in relation to the legislative power of Congress.

14. We shall stress the danger of deducing answers to new constitutional problems from the separation of powers principle as if its "meaning" stood out with "mathematical precision."³¹

15. We shall thus relate constitutional theory to social expediency in a way to illustrate the inseparable connection between the "juristic" and the "non-juristic."

²⁸ Oliphant, "A Return to Stare Decisis," in *American Law School Review*, VI, 215.

²⁹ Cf. Corwin, *The President's Power of Removal*, sec. II.

³⁰ See note 5 above.

³¹ Dissenting opinion of Mr. Justice Holmes in *Springer et al. v. Philippine Islands* (277 U. S. 189).

16. We shall consider briefly the probabilities as to whether the Court will narrow the Myers precedent to the decision, or stretch it to include the *dicta* of the opinion.

17. Incidental consideration will be given to the problem of the conflicting tendencies toward administrative integration on the one hand, and the setting up of independent establishments on the other. This problem presents a conflict of ends which is clearly to be read in the broader implications of the majority opinion in the Myers case. The essay will not accept the Chief Justice's conclusions on the issue.

18. The study will also bring out clearly the fact that in new cases the function of the courts is *ius dare*, not merely *ius dicere*. The theory that judges merely "find" pre-existing law in new cases is based upon a misconception of the nature of inductive inference.

PART I

THE POLITICAL JUSTIFICATION OF INDEPENDENCE OF TENURE

CHAPTER I

THE BACKGROUND AND CLASSIFICATION OF FEDERAL BOARDS AND COMMISSIONS

The justification for the guarantee to federal boards and commissions of a degree of independence of tenure lies in the basic purpose back of their creation. To understand this purpose it will be necessary to start with the changes which led to their establishment.¹

Government in the Era of Laissez-Faire. It is well known that during the nineteenth century the doctrine of laissez-faire prevailed in this country. When analyzed, that doctrine is seen not to mean that there is a sphere of individual activity which is entirely outside the pale of the régime of law. It means rather a minimum of legislative interference, and an emphasis upon "judicial justice" based upon an individualistic common law.² Judicial justice precludes the determination of rights by administrative tribunals.³ And the common law courts went on the theory that each man should be allowed as wide a range of choice in conduct as is compatible with the

¹ Cf. Hart, *Ordinance Making Powers of the President*, pp. 265-291.

² Cf. Pound, *The Spirit of the Common Law*, and "The Theory of Judicial Decisions," in *Harvard Law Review*, June, 1923. See also Keynes, *Laissez-Faire and Communism*.

³ Cf. Dicey's definition of and emphasis upon the "rule of law" in his *Law of the Constitution*.

protection of certain "unalienable" rights of his fellows.⁴ Closely related to these ideas were the distrust of the executive, and the corresponding tendency of legislation to be detailed, specific, and to limit thus the discretion of enforcing officers. Such generalities as found their way into the statutes were interpreted finally and in the spirit of common law individualism by the judiciary. There was, in the absence of many statutes, a minimum of administrative organization, and enforcement was largely through the courts.

There was, in general, no federal common law;⁵ federal legislative powers were limited; and the theory of local self-government, despite Marshall's doctrine of implied powers, kept Congress rather strictly within its enumerated powers. Otherwise, the above picture applied to the government at Washington as well as to the states. And of course these differences meant that the former enacted still less legislation, and needed still less administrative machinery except in connection with national

⁴ The unalienable rights were a combination of English procedural guarantees and deductions from eighteenth century theories of "natural rights," and were embalmed in the bills or declarations of rights of our American constitutions. Under the doctrine of judicial review, these individual rights were protected by the courts even against the legislature. While setting the limits of individual choice, they gave it maximum scope. Cf. Reeves, *La Communauté Internationale*, pp. 39-40.

⁵ See Willoughby, *Constitutional Law of the United States* (students' edition), pp. 445-448. But see also Goodnow, *Social Reform and the Constitution*, chap. IV.

defense and foreign relations. Adjudication of rights was solely through the ordinary federal courts—in the form, therefore, of “judicial justice.” The federal executive enforced the customs laws, operated the post-office, and in general faithfully executed the small amount of legislation, besides performing the special “executive” functions like issuing pardons which the Constitution entrusted to the President.

The theory of laissez-faire and the governmental system just outlined grew, of course, directly out of the conditions of the time. A “minimum” of legislation was possible in a country not yet enmeshed in the industrial revolution. The War of 1812 stimulated manufacturers, but the era of corporate expansion and large-scale mergers did not come until the close of the century. As yet, the federal government’s concern with business was chiefly in relation to tariff protection, which was debated on strictly partisan lines. Such problems as faced Congress were relatively simple as well as relatively few. Industrialism had begun, and increased after the War of Secession; but there was not the vast inter-state network of economic relations that has come in the present generation. Pioneer habit patterns kept alive the old fear of bureaucracy and distrust of expert knowledge.⁶ And with few and simple problems before it, as we have said, Congress did not feel the necessity of delegating wide discretionary and rule-

⁶ Pound, *The Spirit of the Common Law*, *passim*.

making authority to administrative bodies, but frequently wrote its statutes with a minute detail. Legislative abstractions, where they came into its provisions, were "judicially" enforced by the judge and Mr. Dicey's twelve shopkeepers. The idea that government should engage in business operations or even too strictly regulate them was abhorrent to a people still living under simple conditions, eager to exploit the boundless resources before them, and given in large part to agriculture. "Free land" gave each energetic man his chance; and development of a continent was naturally left to individual initiative, without the train of abuses that today would follow. Such regulatory measures as were needed could be adequately handled by the state legislatures. Travel and communication were too primitive, until the railroads and telegraph came, for a Washington bureaucracy to run the country, had that been otherwise desirable; but it was not, since the same limiting conditions prevented the development of a nation-wide market for goods. Even when the railroads came, there was lacking as yet that development of industrial technique through science, and that development of large-scale management, which, since the eighties and nineties, have proceeded with ever increasing momentum.

The Second Industrial Revolution and the Passing of Laissez-Faire. The last mentioned changes were analogous to those of the English industrial revolution. Being a new country with "free land," we

were fifty years behind England in experiencing these developments. Wars and protective tariffs had stimulated some manufacturing along the Atlantic seaboard, but now the growth of population led to the absorption of "free land," and gave us something like a permanent labor class. Cities and manufacturing gave us problems of industrialism. Corporations and "trusts" grew apace.[†]

There were two reasons, however, why the federal government was not at first affected. In the first place, economic changes are always in advance of political ideas; and theories of laissez-faire and local self-government outlived their day. In the second place, the early stages of industrialism presented problems which could be handled by the states. The national market, as we know it today, had not come into being. And such regulation as was necessary could be enacted by the several state legislatures.

However, during the last quarter-century the perfection of transportation and communication facilities, and the enormous advances of science have extended the market so as to make possible a division of labor heretofore undreamed of, and have offered the technical facilities therefor to enterprising corporations with sufficient capital. This has proceeded, during the last ten years, with such increasing momentum as to remake our economic order. Nor has

[†] The creation of the Interstate Commerce Commission in 1887 was followed in 1890 by the enactment of the Sherman Anti-Trust Act; and the federal government had begun its control of national business.

it proceeded anywhere else nearly so fast as in the United States." So far-reaching are the effects—economic, social and governmental—that this era may truly be called the Second or American Industrial Revolution. It may be merely the flowering of the first industrial revolution, from which it differs chiefly in its momentum, its scope, and hence in its social and political implications. But all we really mean by a difference in "kind" is a vast difference in "degree." And that we have certainly had. The first industrial revolution was a gradual process. By comparison, the second has been sudden.

For us, then, the effects of the first industrial revolution merged with the second. It was not until the eighties and nineties that industrialism began to create really serious problems; and these were at first handled almost exclusively by the states. The railroad problem was the first exception.⁸ By the time the federal government was entering the general field of business regulation, the momentum of the industrial system had so increased that the second industrial revolution was upon us. The latter was precisely a startling speeding up of a series of then rather recent tendencies.

The changes have been most marked in the industrial states, but the effects have been felt even in the agricultural regions. An important aspect of this economic revolution has been the creation of a

⁸ Cf. the estimate of present-day American economic development by a French writer in: Siegfried, *America Comes of Age*, part II.

⁹ Cf. note 7 above.

national and even a world market for farm products. The people in industrial centers had to be fed, and food had to be shipped to them from afar. Agricultural machinery had itself important effects. And the farmers purchased in turn manufactured products from the cities.

The new era has brought large urban districts with problems of health, housing, water supply, city planning, and so on. It has brought a minute division of labor, and sharp conflict between employer and employee. It has brought a great increase of businesses rendering services to the public, many of which are in the nature of "natural" monopolies. It has brought all sorts of group organization. And the network of economic relations which it has produced is not confined by state boundaries, but spreads out over the whole country, in a very complex fashion. Economic interdependence is one of the outstanding factors in the situation.

The governmental effects of these economic changes have been most significant. "New situations" required an extension of common law principles to cover them. If the judges met the new problems by a sort of automatic extension of individualistic principles, there was a demand for legislation to remedy the situation.¹⁰ But many of the

¹⁰ In order, for example, to eliminate the common law doctrines of assumption of risk, contributory negligence, and the fellow-servant doctrine, which protected the employer in suits brought by his employee for damages for injuries sustained during the course of the employment. Cf. Commons and Andrews, *Principles of Labor Legislation*, p. 31 (see index, under title Workmen's compensation).

new problems were so highly technical, so complex, and connected with such rapidly changing conditions, that neither judges nor legislators were sufficiently versed in the subjects to act intelligently. This led to the creation of specialized boards and commissions,¹¹ with regulatory or fact-finding powers. The regulatory bodies were to concretize, by specific application, the abstractions of broadly stated legislative rules. They thus began to develop an important body of administrative law; and "judicial justice" to that extent gave way before "administrative justice," though there was preserved final appeal to the ordinary courts. Executive organs were given power to make rules and regulations "having the force of law" for certain purposes; and the power to make, in many technical cases, final determinations of "questions of fact." Even where rule-making powers were not conferred, the passage of numerous complex laws greatly expanded the discretion of executive and administrative officials in their execution of the laws. For it became necessary to enact merely broad principles, rather than detailed statutes, such as had been possible under simpler conditions. Of course, the administrative services had also to be greatly enlarged, if the rapidly expanding body of statutory law was to be effectively administered. And this brought to the fore the im-

¹¹ For example, workmen's compensation and public utility commissions. See Mathews, *American State Government*, chaps. XII and XIII, and White, "The Growth and Future of State Boards and Commissions," in *Political Science Quarterly*, XVIII, 631.

portance of administration as a major problem of the future state.¹² Problems of personnel, matériel, efficiency, adequate budget and accounting systems, and the like pressed for solution.¹³ And, on the political side, president and governor alike became, as never before, party leaders with legislative programs calculated to help in the solution of pressing problems.¹⁴

The federal government has by no means escaped the effects of these changes. The Civil War had ended the States' Rights doctrine as a fundamental postulate of our constitutional system, and had even weakened its importance as a rule of expediency.¹⁵ It had thus laid the foundation for that growth of federal legislative interference which the new economic era has demanded. Continued preachment of laissez-faire, local self-government, and the dangers of a federal bureaucracy¹⁶ has not prevented an unprecedented expansion of federal activity. We were faced by a condition before which a theory which no longer fitted our needs had in practice to

¹² Professor T. H. Reed has well called this the "era of administration"; see his *Municipal Government in the United States*, pp. 109 ff.

¹³ Willoughby, W. F., *Principles of Administration*.

¹⁴ Examples are Roosevelt and Wilson as presidents, and Aycock (N. C.), Lowden (Ill.), Wilson (N. J.), Lafollette (Wis.), Johnson (Cal.), Smith (N. Y.), and Byrd (Va.) as governors. See especially Hart, "Classical Statesmanship," in *Sewanee Review*, October, 1925; Wilson, *Constitutional Government in the United States*, chap. III.

¹⁵ Cf. Dunning, *Essays on the Civil War and Reconstruction*.

¹⁶ Since the world war there has been a reaction against centripetal forces, led by men from President Coolidge to Governor Ritchie of Maryland. But these spokesmen have not stayed the basic forces at work.

yield. Interstate railroad and telegraph rates and services had to be regulated in the interests of the "public," and could not constitutionally be regulated by the states.¹⁷ The people had to be protected against impure foods and drugs shipped from one state to another; and this could not satisfactorily be left to state control after the "original packages" had been broken and the products had ceased to be interstate commerce.¹⁸ Monopolies in restraint of trade and "unfair" trade practices had to be federally controlled, if controlled at all, in so far as they involved interstate commerce.¹⁹ The national banking system, on which the national credit system depended, had to be modernized and made more flexible.²⁰ Protection to manufacturers through the tariff became more important than ever before in our history.²¹ New discoveries like radio suddenly created new fields of activity where chaos could only be prevented by federal licensing and control.²² The federal government, in some cases, had to engage in

¹⁷ Since the Supreme Court had held that silence of Congress meant that interstate commerce must remain unregulated, and that Congress might not even explicitly delegate its power over interstate commerce to the states. But see, for qualifications of these generalizations, Willoughby on the Constitution, I, 124 ff., II, chaps. LIII ff.

¹⁸ This led to the enactment by Congress of pure food and drug acts excluding "impure" foods and drugs from interstate shipment. On the original package doctrine see Willoughby on the Constitution, chap. LV.

¹⁹ This led to the Sherman and Clayton Acts and to the creation of the Federal Trade Commission.

²⁰ This involved the creation of the Federal Reserve Board.

²¹ Hence, the creation of the Tariff Commission and the changes in its functions to meet successive party needs.

²² Hence, the Federal Radio Commission.

"business" enterprises.²³ And so the doctrine of implied powers was stretched to the limit, and the interstate commerce, postal and taxing powers of Congress, especially, were employed to justify that body in doing indirectly—and for "police" purposes—that which it could not directly do.

Aside from its lack of general common law jurisdiction, the other effects outlined above apply also to the federal government as well as to the states. The jurisdiction of the federal courts over cases of diverse citizenship has greatly expanded; and they have widened the group of cases in which they refuse to be bound by state decisions on the common law.²⁴

But the most significant result for the federal government, aside from the expansion of its legislative activity, has been the rise of what has been called "government by commission." This we regard as a leading means whereby a governmental system created in the eighteenth century has been adapted to twentieth century conditions. And we must examine in some detail the purpose and significance of the creation of such boards and commissions before we can appreciate the importance of guaranteeing their independence of political control.

CLASSIFICATION OF BOARDS AND COMMISSIONS

For our convenience we need to begin with a classification of the agencies under consideration. Our

²³ Hence, the United States Shipping Board.

²⁴ For a discussion of the doctrine of *Swift v. Tyson*, see Wiloughby on the Constitution, II, 1309 ff.

primary purpose, to be sure, is to demonstrate that, with reference to the independence of tenure of their members, all or most of them belong in the same category. But if we are to elaborate in any detail our justification of independence of tenure, it will be necessary to deal separately with different types of commissions. For that purpose the most important distinctions relate to their functions, and give us the following types: (1) regulatory bodies; (2) investigatory bodies; and (3) business-managing bodies.

In making this classification, we must call attention to the fact that, as a method, classification is relative to an immediate purpose. That purpose furnishes the criterion of what differences are relevant, what are irrelevant. For this reason it is not necessary to set up the claim that our particular classification is the "primary" one. It is "primary" if and only if it proves to be useful for our present purpose. Nor do we mean to imply that there are no common features of the work of commissions in different classes, or that a commission of one class may not have incidental functions which to that extent place it in another class. No more do we mean to imply that our classification exhausts the differences between these several bodies. For another purpose another classification based upon a different criterion and hence presenting other differences would be more important. Indeed, it may be incidentally necessary to consider some other classi-

fications which are sufficiently related to our major purpose to be introduced into the argument. For example, we have the distinction between specially selected, full-time boards, and those made up partially or wholly of officers acting in an *ex officio* capacity. Of the former sort is the Federal Tariff Commission; of the latter kind, the Federal Power Commission, which is composed of three department heads *ex officio*. Unless it is desirable or possible to make these three officers independent of the President, the Power Commission, as such, cannot be made independent unless it is differently constituted. And thus a classification based upon the constitution of these agencies is directly related to our problem. And it may be added that two bodies classed together for one purpose may have to be classed in different categories in another connection. We mention these elementary characteristics of classification at this point in order to anticipate objections that might otherwise be raised by those persons, all too many, who seem to think that there is some one "correct" way of classifying data in scientific work.²⁵

With this brief warning, we may return to the three-fold classification suggested above. First, regulatory bodies perform what are loosely termed

²⁵ On the nature of classification as a method or technique of scientific investigation, see Dewey, *Human Nature and Conduct*, pp. 131 ff.; Bastable, *Public Finance*, pp. 157-158, 163-164, 167; Hart, *op. cit.*, p. 27; Cunningham, *Textbook of Logic*, pp. 66-71; Keller, *Starting Points in Social Science*, pp. 8-10; Kallen, *The Philosophy of William James*, pp. 67 ff.; Whitehead, *Science in the Modern World*, p. 41; Barry, *The Scientific Habit of Thought*, chap. III.

“quasi-judicial” functions, and are often termed “administrative tribunals.”²⁶ Their functions relate to the regulation, under statutory provisions and with final appeal to the courts, of economic activities. A leading example is the Interstate Commerce Commission, with its power to fix railroad rates and to control railroad service and practices.

Secondly, investigatory bodies have no power to regulate, but are empowered merely to conduct investigations which may form the basis of regulatory action by other authorities. The best example is the United States Tariff Commission. That body cannot itself fix tariff rates under the flexible tariff. That power has, within statutory limits, been vested in the President. But, before he acts, he must order an investigation by the commission.²⁷ It will not be contended that every board, however temporary, which is set up to investigate conditions and make findings can be guaranteed independence of tenure. But it will be maintained that Congress, in creating such an agency, should be able to make it independent, and that the Tariff Commission is a prime example of the sort of investigatory body that should be given such independence.

Differing from both these classes is class three. The organs in this class are not confined to investigatory functions. Nor do they regulate privately owned businesses. They are created to operate for

²⁶ For references see Hart, *op cit.*, p. 328.

²⁷ See sec. 315 of the Tariff Act of 1922 (42 Stat. at L. 858, 941).

the government publicly owned and operated business enterprises. The best example is the United States Shipping Board, which handles the broader questions relating to the United States Merchant Fleet Corporation and the merchant fleet which is operated by the latter.²⁸

It is evident that, when analyzed, this classification is based upon two criteria. First, there is the distinction between bodies which have and those which lack the power to make decisions having legal consequences. Of the former sort, there are those bodies whose decisions constitute governmental acts in regulation of private business relations, and those other bodies whose activities have primarily to do with the operation of a governmental enterprise, and affect private interests only in their relation to such governmental undertaking.

In some respects, at least, the "administrative tribunal" is the most important type of commission; and we shall give it the fullest consideration,²⁹ referring briefly to the reasons why the other two types should in some cases, at least, also be made independent. Finally, we shall raise the question whether there are, besides these federal boards and commissions, still other departments,³⁰ agencies or officers³¹

²⁸ We shall show later that the Post-Office Department is, for our purposes, in the same category.

²⁹ See chap. II below.

³⁰ Such as the post-office, agriculture, commerce and perhaps other departments. See chap. III below.

³¹ Notably, the Comptroller General of the United States. See chap. III below.

that are to be classed with them for the purposes of this study. That is to say, we may well ask what other agencies, if any, should be given independence of tenure. For this will have an important bearing upon our formulation of an expedient constitutional theory of the removal power.

CHAPTER II

THE ADMINISTRATIVE TRIBUNAL

THE "NECESSITY" FOR INCREASING GOVERNMENTAL REGULATION

Most students of government will probably agree with the generalization that the economic revolution has "necessitated" an increase of governmental regulation. They will probably agree also that, this revolution being still in progress, governmental control will "necessarily" increase in the next generation.

What do we mean by saying that this relegation of laissez-faire to the background has been, and will continue to be, a "necessity"? We refer, of course, to no mystical "force"¹ driving us on, to no fatalistic philosophy. We mean primarily that the development of a network of complicated economic relationships has multiplied the instances in which the associated activity of one group affects indirectly the other groups in the community; and that these other groups have, in the more obvious cases, recognized these indirect consequences as affecting their interests, often adversely, and accordingly have sought, through government, to control such con-

¹ On the misuse of the concept "causal forces" in "explaining" phenomena, see Dewey, *The Public and Its Problems*, pp. 9, 17-21, 25, 36, 37, 47, 53, 65, 66.

sequences. As a result of their demands, such control has taken place even while we have more or less continued to give lip-service to the doctrine of laissez-faire. We still admit that governmental regulation should be kept at a "minimum." But the sum total of these specific demands for control of indirect consequences has been an enormous expansion of governmental regulation.

We have here an excellent application of John Dewey's empirical theory of the state,² which we may summarize as follows: Human beings associate. We cannot explain this, any more than we can explain the association of atoms. We have to take it as a datum. Associated action has results or consequences. Some of these results are perceived, noted in such a way as to be taken account of. Then there arise purposes, plans, measures and means, to secure consequences which are liked and to eliminate those which are found obnoxious. A common interest is generated by this perception of consequences; that is, those affected tend to associate to control the consequences. The consequences sometimes are confined to those directly involved in the transaction which produces them. But sometimes they extend far beyond those immediately engaged in such transaction. We may thus make the broad classification of direct and indirect consequences. Correspond-

² *Ibid.*, *passim*. The summary in the text is largely in Mr. Dewey's own language as found on pp. 34-36. The author's indebtedness to this work is gratefully acknowledged.

ingly, we have two sorts of interest and two sorts of organization or cooperation for control of consequences. In the first sort, interest and control are limited to those directly engaged; in the second, they extend to those who do not directly share in the acts. For the former sort of interest, efforts at control are direct; for the latter, they must be indirect.

So far, says Mr. Dewey, he has merely been stating actual fact. His hypothesis is that those indirectly and seriously affected for good or evil form a group distinctive enough to be given a name. These he calls the public. Their shared interest is the public interest. In so far as the public perceives its interest, it seeks organization. It is organized and made effective by means of representatives who are to care for its especial interest. These are public officials, or collectively named, the government. The state is the public plus the government through which it is organized to control the indirect consequences of the associated action of groups.

Such is his generic account, with the omission of details of differential conditions. It gives us a formal criterion for determining how good a particular state is, namely, the degree of effective organization of the public which is attained. This is, however, only a formal criterion; for not until history is ended can we say concretely which form of state is best.³

³ Ibid., p. 33.

In no two ages or places is the public exactly similar. The industrial revolution has brought into being new publics, though they are as yet only inchoate.⁴ Politically they are not organized so as effectively to control the indirect consequences of associated action; as yet they are groping and confused. But it is clear from his account that the increased functions of government mark the coming into being of new publics, of which The Public is but the generic name. The problem of the art of government is to devise governmental instrumentalities for making the protection of the "public interest" effective.

So long as the consequences of associated action extend but little beyond those immediately concerned, there is no demand for more regulation than is necessary for such elementary matters as the keeping of the peace. To that end there needs to be an "official" tribunal to settle controversies; but such a tribunal will allow to the individual a maximum range of choice of conduct. Individualism will prevail; and regulations will be confined to small units, because the consequences do not extend beyond them. This describes, at least, the "frontier era" in America.

The economic revolution, however, has caused consequences to extend even beyond the borders of single states, to persons and groups not directly concerned in a given activity. These indirect conse-

⁴ Ibid., chap. IV.

quences are not at once recognized. But so fast as they are, they lead to demands for control; and the unit of government turned to is the national government or even some international conference,⁵ because the range of the indirect consequences is ever expanding.

The recognition of the indirect consequences referred to brings into being a "public" which in each case demands that its "interest" be protected. The dominant view at a given time of what constitutes such a "public interest" fixes the scope and limitations of regulation.⁶ The inclusion or exclusion by the Supreme Court of one or another business in the category of a "business affected with a public interest" is merely the method by which, under our system, this dominant view is authoritatively articulated. Unless we become revolutionists, we can at the most criticize this method as compared with some other, such as the location of finality of decision in the legislative assembly. There are many who attack judicial review of legislation on the very ground that it furnishes a more belated recognition of a new "public" than the other alternative. Criticism of particular judicial decisions on such matters, however, does not necessarily imply an attack upon the method in general.

⁵ Dunn, *The Practice and Procedure of International Conferences*, makes a suggestive application of Dewey's thesis to the conference as an agency for the protection of the "interests" of "publics" that cut across political boundaries.

⁶ Cf. the opinion of Mr. Justice Holmes in *Noble State Bank v. Haskell* (219 U. S. 104).

Our concern is to point out that, given the elaboration of indirect consequences, the demand for their control by a unit large enough to succeed is "inevitable." The rest is merely a matter of time. How long before the consequences will be sufficiently recognized for the new "public" to organize demands that the machinery for control in its "interest" be set up? How long before the legislative organ will, upon the given basis of its make-up and responsibility, give heed? How long before the courts, with finality of decision, will agree to enforce the legislature's regulation? It is simply this to which we refer when we declare the increase of regulation "necessary" and "inevitable."

The complication of economic relationships, their integration through gigantic productive enterprises, and their regulation by governmental agencies—where will these things lead us? We may, indeed, ask with William Morton Wheeler: "Will this prospective, more intensive socialization be analogous to that of the highest social insects, a condition in which specialization and constraint of the single organism are so extreme that its independent viability is sacrificed to a system of communal bonds, just as happens with the individual cell in the whole organism?"¹ But this warning of a distinguished entomologist can do no more than induce us to establish, as a working hypothesis, a presumption against increased regu-

¹ Wheeler, "Emergent Evolution and the Social," in *Science*, November 5, 1926, p. 438.

lation in general. Such a presumption cannot in the long run remain absolute and irrebuttable. It should be regarded as merely a "tool" which is to be brought to the investigation of a particular case.⁸ From probable dangers in the cumulative effects of the expansion of regulation, we cannot, out-of-hand, conclude that Congress should abolish control of the railroads, or even that the government should not undertake a "retail" business at Muscle Shoals. Unless and until we can devise means for decentralizing our economic system itself,⁹ we might as well bay at the moon as resist the demands of the "new publics" for national control.

We mean precisely this when we state that regulation is the "only alternative" to government ownership and operation—a device which would take us still farther in the direction against which Wheeler warns us. For this is merely the generalized statement of what is rapidly becoming a dominant assumption of our era. We may profitably call into question such a dominant assumption only on two conditions: (1) if the criterion in question is so obviously failing to secure social stability and adjustment that its reconsideration is being demanded from important quarters; (2) if we are faced by a borderline case where we must decide whether or not to apply the criterion. Except in these two cases,

⁸ Dewey, *Human Nature and Conduct*, pp. 240-241.

⁹ Dewey, *The Public and Its Problems*, pp. 211-219; cf. Cooley, *Social Organization*, chap. III.

criticism of dominant postulates of our era, while it may have long-run effects in a future era of transition, will for the time being be a form of academic speculation.

In the distant future the coercive aspect of government may, indeed, be pushed into the background. Let us agree that Mr. Hoover has made a very important contribution by his idea and practice of administrative cooperation with business and social organizations.¹⁰ Let us even agree that this idea is capable of an indefinite expansion which may cause important phases of government to become enlightened guidance in voluntary agreement rather than coercive control. Yet, under present conditions and our present habits of thought, this does not preclude the present "practical necessity" for many sorts of regulatory measures for the protection of the "public interest." The idea that some day this may be unnecessary is a sort of philosophic anarchism that Mr. Hoover would be the last to assert in any save limited terms. As a complete substitute for all forms of regulation, the Hoover idea is as yet in the realm of speculation.

THE NECESSITY FOR THE DEVOLUTION OF REGULATORY AUTHORITY

Here again we have to deal with a "practical necessity." Regulation implies legislation; for the

¹⁰ Cf. the address which, during the 1928 campaign, Mr. Hoover delivered at St. Louis (see *Baltimore Sun*, November 3, 1928).

changes have been too rapid and sweeping for adjudication alone to meet the demand for new rules to control new situations.¹¹ And under our system legislation implies action by a popularly elected assembly of amateurs.¹² The demands for new laws in the "public interest" have thrown upon Congress—as well as upon our state legislatures—increased burdens with which it has not been prepared to cope. It had more problems urged upon it for solution; more bills were introduced. The conditions to be regulated were not simple and familiar, as they had been in the agricultural era, but extremely complex, involving intricate economic relations, and extremely technical, involving subjects known only to those directly engaged in the business or those who had studied it for years. These conditions, moreover, now changed with a rapidity unknown even in the early phases of the English industrial revolution. It is obvious that a body which meets only periodically, which is composed of lawyers and others with no technical knowledge of these problems, and which is chiefly concerned with maintaining political "fences" back home, is not suited to handle the details of such problems as readily as those of a simpler time. The new "publics" that came into being required new agencies, new instrumentalities for the control which their "interests" required. The old methods had to be re-adapted to these new

¹¹ Cf. Maine, *Ancient Law* (Everyman's edition), pp. 15 ff.

¹² Lowell, *Public Opinion and Popular Government*, chap. XVI.

demands. As John Dewey says: "Since the public forms a state only by and through officials and their acts, and since holding official position does not work a miracle of transubstantiation, there is nothing perplexing nor even discouraging in the spectacle of the stupidities and errors of political behavior. . . . Just as publics and states vary with conditions of time and place, so do the concrete functions which should be carried on by states. . . . 'The new age of social relationships' has no political agencies worthy of it. The democratic public is still largely inchoate and unorganized. . . . Political and legal forms have only piecemeal and haltingly, with great lag, accommodated themselves to the industrial transformation. . . ." ¹³ For the new "publics" to become organized with any sort of effectiveness regulatory methods had to be re-adapted. Institutions, says Keller, are "blocks of adjustments." ¹⁴ And just as we have, in organic evolution, variation, selection and heredity as the three factors in adjustment, so in the case of institutions we have variation in human reactions, selection of reactions which "work," and transmission of these through education. ¹⁵

And so the new publics demanded regulation by existing agencies unequipped for the task. The "inevitable" result was some attempt to select ways and means for giving these publics more effec-

¹³ Dewey, *The Public and Its Problems*, pp. 68, 74, 109, 114.

¹⁴ Keller, *Starting Points in Social Science*, p. 43.

¹⁵ *Ibid.*, chap. II, espec. pp. 36-37.

tive organization, to select methods for effectuating the desired control of indirect consequences.

Being unable to handle the new situation, Congress adopted several devices: (1) to rely upon the experience of the administrative departments; (2) to elaborate committee hearings; (3) to rely more and more upon committee reports, thus establishing an internal division of labor and specialization; (4) to set up temporary or even permanent bodies of investigation; (5) to delegate to executive or administrative officers and agencies the power to issue rules and regulations to concretize the abstract principles laid down in the statutes;¹⁶ (6) and to set up commissions to apply to particular situations the legislative abstractions.

Some of these have naturally proved more efficient than others. This has been especially true of the last two devices. For even with assistance from the departments, from committee reports and from investigatory commissions, Congress cannot itself solve the new regulatory problems. A legislature which attempted to work out a detailed solution of the interstate rate problem would create a hopeless economic situation. Conditions change so fast that its solution, if satisfactory today, might be out of date a year hence.¹⁷ As a matter of fact, such new

¹⁶ Hart, *The Ordinance Making Powers of the President*; Comer, *Legislative Functions of National Administrative Authorities*.

¹⁷ This difficulty has arisen even in the work of the Interstate Commerce Commission in the evaluation of railroad property, which is to be the basis of rate-fixing.

problems are so little understood, that ready-made solutions are, even for particular conditions, impossible. We need a method where trial and error can readily be applied. This is certainly not the legislative method, for a body like Congress moves slowly, and it meets only periodically. It is not a continuous body like the Executive or an administrative tribunal. Hence, its mistakes cannot be so readily corrected, or its rules so readily amended to meet changing conditions. Meanwhile, the hands of enforcing agencies are tied, and the unsound statutes, or those that are out of date, are, presumably, to be enforced. This is the more disastrous, the more detailed and specific such laws have been made—unless indeed, such laws are merely ignored, a method that helps no whit in the solution of the problem. And, finally, popular legislatures are fickle bodies, and, as the result of a party turnover, may inject chaos into an economic situation by substituting for one set of detailed rules another of a very different character. This would work confusion in administration, and upset the calculations of those engaged in the enterprises to be regulated.¹⁸

The result has been a change in the regulatory rôle of Congress. By the Anglo-American tradition legislation has been relatively concrete, specific, detailed, and has attempted to narrow executive

¹⁸ Cf. Carré de Malberg, *Théorie générale de l'Etat*, I, 467; Raiga, *Le pouvoir réglementaire du Président de la République*, pp. 6-7; Freund, "The Substitution of Rule for Discretion in Public Law," in *American Political Science Review*, November, 1915.

discretion by limiting provisos, and by the anticipation, so far as possible, of all future contingencies.¹⁹ While no statute can fully and exactly classify phenomena, or completely anticipate future contingencies, nevertheless, this end is more nearly attainable under simple and stable conditions. And, relatively speaking, it was formerly approximated. Now, however, the Congress finds even the effort at attainment impracticable. It is forced to enact abstractions, mere "skeleton legislation," as Lord Herschell termed it.²⁰ It merely lays down general principles or standards, such as, that railroad rates be "reasonable."

This is but to say that the burden of regulation has been in large measure shifted elsewhere—developed upon other agencies. For statutes, to be effective, must be applied to concrete situations. To the extent that they are specific and concrete, their application involves "administration" in the mechanical sense of performing non-discretionary physical acts. Even these involve a greater or less degree of judgment, but judgment in the application of relatively definite criteria. On the other hand, to the extent that legislative prescriptions are set forth in abstract terms which include such concepts as "reasonable" or "unfair," the important steps in the governmental process come as intermediate terms between legislation and mechanical administration.²¹ Upon

¹⁹ Hart, *op. cit.*, p. 19.

²⁰ Cf. Carr, *Delegated Legislation*, p. 16.

²¹ This is made clear by Hart, *op. cit.*, chap. II.

other bodies than Congress falls the burden of testing specific acts by the vague abstractions which Congress has laid down. This means that these other bodies consciously or unconsciously apply in their decisions criteria of reasonableness or of fairness. In so doing they concretize the legislative abstractions by the exercise of discretion of a very broad sort. They themselves have the authority—if we exclude for the moment judicial review of their decisions—to say that a given rate is or is not reasonable, and to order a rate that is reasonable. But that rate is not, *per se* and objectively, reasonable. It is reasonable only when the authorized agent decides it is. And the criteria for the decision are subjective, dependent upon the assumptions which the agent brings to the decision. The problem is now reduced to a choice of agencies upon whom the burden is to be devolved. We are to seek the agency that can perform the task better than Congress or than other agencies to which it might be delegated.

THE INADEQUACY OF "JUDICIAL JUSTICE" THROUGH THE ORDINARY TRIAL COURTS

Our traditional method of enforcement has been to set up a minimum of administrative machinery, and to depend upon judicial enforcement. Even under *laissez-faire*, the postal system and tax collection involved a considerable, if amateur, bureaucracy, and some important "political" decisions were left to the President or other major executive

heads. But traditionally such regulatory standards as were enacted by the legislature were to be enforced by the judiciary.²² That is, the person violating these standards made himself liable to civil or criminal action, or to both. And it was Mr. A. V. Dicey's twelve shopkeepers²³ who judged the acts of the defendant by the abstract standards of the legislature, just as, in the absence of legislation, they judged acts by the common law standards set forth for their guidance by the judge. These twelve shopkeepers could re-examine administrative determinations of fact as well as of the application of law to the facts; while the judge instructed them as to the formulas to be applied.

In the application of common-law and occasional legislative standards like "due care," this method "worked" with tolerably satisfactory results for a long time. Given a simple, man-to-man situation of common every-day experience, and twelve shopkeepers reflect quite well the current criteria for "due care."²⁴

Then the industrial revolution brought a whole series of unprecedented situations, so removed from ordinary life, and requiring such technical knowledge or so broad an understanding of social relations

²² Dickinson, *Administrative Justice and the Supremacy of Law*, chap. I ("Regulation by Government versus Regulation by Law").

²³ That is, the jury, which, as Lowell points out, resembles the legislature in being composed of "samples" of the community. See Dicey, *Law of the Constitution*, p. 242, and Lowell, *Public Opinion and Popular Government*, pp. 242-243.

²⁴ Holmes, *Collected Legal Papers*, pp. 237-238.

in a complex society, that a jury became helpless. Legislatures tried to formulate new rules to meet new and complex situations. But we have seen that legislatures had themselves to lay down abstract principles. How, then, could a jury apply to unfamiliar situations these standards any better than the older common law standards? In both cases, the jury system now proved a defective, hit-or-miss method of settling important questions of social policy. The twelve shopkeepers had to pass judgment upon situations which they no longer could understand. And even the judge, especially when sitting without a jury in equity cases, but also in selecting or interpreting a rule,²⁵ lacked the technical knowledge for an intelligent decision. He all too often, in the absence of other data, had unconsciously to fall back upon preconceptions ingrained in his early training under *laissez-faire*.²⁶

Under modern specialization, with its chains of relationships and its not easily understood multiplication of "indirect consequences," "judicial justice" has thus become an unsatisfactory method for the solution of complex regulatory problems. Its specific defects are, for the most part, due to the

²⁵ The judge was trained in the "law," not in social science; and he carried to the economic situations with which he was faced the political economy of Mill and the social philosophy of Spencer. Cf. Frankfurter, "Constitutional Opinions of Mr. Justice Holmes," in *Harvard Law Review*, XXIX, 683, 687; Cardozo, *Nature of the Judicial Process*, pp. 65 ff.

²⁶ Cf. Pound, "Administration of Justice in the Modern City," in *Harvard Law Review*, XXVI, 302, 324 ff.

same factors which made it necessary for legislatures to devolve their regulatory powers upon others. But the courts are not in a position so to devolve their functions. These factors which have rendered inadequate our traditional trial court system may briefly be outlined:

(1) The complexity of the relations to be controlled, and hence the technical knowledge required to master these complex relations.

(2) The variety of situations that arise in connection with a given problem, and hence the necessity for elaborate investigation of conditions in general, in order to discover useful classifications, as well as for the careful investigation of each situation as a separate problem.

(3) The multiplicity of the problems, which implies that no single judge can have knowledge of all types of problems.

(4) The predominance in these regulatory policies of the aim of protecting those indirectly affected by the consequences of associated action—of protecting, that is, the “public interest”—and hence, the rapid development of new standards to supersede the older standards of an era when these new “publics” had not come into being.²⁷

(5) The increasing cumbersomeness and costliness of our traditional judicial enforcement, with its

²⁷ Administrative law, as Robson says, is law in the making. See his *Justice and Administrative Law*, pp. 274-275. Cf. Dickinson, *op. cit.*, pp. 8-9.

rules of evidence evolved under conditions of simple community life.²⁸

(6) The growing importance of regulatory policies, and hence the necessity that they be adequately handled, rather than treated as exceptions where occasional breakdowns of "judicial justice" are not disastrous.

The modifications which are needed²⁹ to transform our traditional trial courts into something like adequate agencies of regulation are directly related to these factors. We may list these needed modifications, and then proceed to ask if other agencies would be better than such "modified trial courts."

THE MODIFICATIONS OF THE TRIAL COURT NECESSARY TO
MAKE IT AN EFFECTIVE REGULATORY
INSTRUMENTALITY

These modifications may be briefly listed:

1. The substitution of permanent experts for a court composed of lay jurors and legally-minded judges. These experts must be equipped with research staffs and research facilities³⁰ for the determination of the "facts" and of the question

²⁸ Willoughby, W. F., *Principles of Judicial Administration*, chap. XXXI.

²⁹ When we say that these modifications are "needed," we mean merely to state that the administrative tribunal—which is the "modified trial court" to which we refer—is the instrumentality which has been devised to serve the new needs described above. That this is the "ideal" method for making effective the demands of the new publics we do not claim. But given the end of making these demands effective, experience shows that these bodies are the best means to that end yet devised.

³⁰ Cardozo, in his *Growth of the Law*, p. 117, points out the need for fact-finding agencies attached to our ordinary courts.

"whether the legislative standard is met."³¹ They are also intended, as experts, to bring to their decisions technical knowledge of the subject and an understanding of the economic problems involved.³² By a combination of expertness and of permanence of tenure this substitution is also meant to bring to the working out of complex economic problems not only technical knowledge, but also continuity, and a relative "uniformity" and "certainty" in decision, such as a temporary body composed *ad hoc* of twelve "samples" of the community can never furnish. Cumulative experience will, on the other hand, prevent uniformity from becoming artificially rigid, and continuity will be tempered by the method of trial and error.³³

2. Specialization among these "modified courts." Instead of having the same court exercising jurisdiction over a whole series of regulatory problems, each of which is difficult to master, there will be a separate body for each major regulatory problem. The judge of the traditional trial court is thoroughly familiar only with legal formulas, not with the range of knowledge necessary for intelligent exercise of "general jurisdiction."

3. Provision in each such tribunal of a plurality of "judges," in order that decision, involving, as it does, the application to a complex situation of vague

³¹ Pound, *Introduction to the Philosophy of Law*, pp. 116 ff.

³² Cf. Lowell, *Public Opinion and Popular Government*, chaps. XVI ff.; and Robson, *Justice and Administrative Law*, p. 267.

³³ Robson, *op. cit.*, pp. 274-275.

criteria like "reasonableness," may be made by a balanced judgment.³⁴

4. Creation of conditions under which adequate recognition can be given to an enforceable "public interest" in a way that the traditional judicial technique and attitude toward "vested interests" make difficult.³⁵

5. Simplification of our traditional judicial procedure, especially of the rules of evidence.³⁶

6. Provision for finality of decision on the part of this modified "trial court," except in so far as it is found expedient to preserve judicial review to appellate courts with reference to such matters as: "questions of law,"³⁷ including excess of jurisdiction; the patent abuse of power;³⁸ and the guarantee

³⁴ An experienced member of an important federal administrative tribunal once said in the author's presence that three men bring more judgment than one, that in important cases five add in judgment without making discussion much more difficult, that seven add a little in judgment, but this is largely counteracted by the inability to discuss the problem around a table, that a body of nine is unwieldy without having a noticeably more trustworthy judgment than one of seven, and that one of eleven is hopelessly unwieldy without having anything added in balanced judgment. Attention is called to the plurality of judges in French trial courts. *Sait, Government and Politics of France*, p. 400.

³⁵ Pound, *op cit*, pp. 137 ff.; Robson, *op cit*, pp. 256-260, 323.

³⁶ Robson, *op cit*, pp. 263-267.

³⁷ Cf. Albertsworth, "Judicial Review of Administrative Action by the Federal Supreme Court," in *Harvard Law Review*, XXXV, 127; Curtis, "Judicial Review of Commission," in *Harvard Law Review*, XXXIV, 862.

³⁸ Cf. *Illinois State Board of Dental Examiners v. People* (123 Ill. 227).

of elementary judicial procedures, such as notice and a hearing.³⁹

7. The preservation of certain factors of the judicial process, factors which we shall sum up under the title of "judicialization" of the tribunals. This point will be presently elaborated.⁴⁰

THE RESULT: QUASI-JUDICIAL COMMISSIONS

It is evident that the result of these modifications is the establishment of such quasi-judicial tribunals as the Interstate Commerce Commission and the Federal Trade Commission. In other words, these regulatory boards and commissions are the twentieth century means for organizing the "interests" of the new "publics" which the second or American industrial revolution has brought into being. They are one device for adapting governmental machinery and processes to conditions which have arisen since such machinery and processes were originally worked out. They are the products of the devising and selecting of variants in the "block of adjustments" known as "governmental regulation." They are the means of readjustment to new environmental conditions. It is not a question whether some philosopher could devise means more adequate in theory. It is that they are useful, if not perfect, modes of readjustment. But we are now at the cross-roads of

³⁹ Cf. *Wichita R. R. & Light Co. v. Public Utilities Commission of Kansas* (260 U. S. 48).

⁴⁰ Robson, *op. cit.*, pp. 262-275, gives an excellent summary of advantages of administrative law. He adds a summary of disadvantages on pp. 275-282.

decision of whether we shall or shall not "judicialize" these agencies. The decision of this matter will probably have important consequences for their effectiveness as guardians of new "public interests."

A CHOICE OF ALTERNATIVES

We have sought to indicate the practical necessity of increased governmental regulation, and the necessity of the devolution of regulatory power upon other agencies than the legislature. We have pointed out the inadequacy of the traditional trial court as an agency upon which to devolve such power, and have suggested the modifications which are necessary to make it an effective tool. The result is the regulatory commission with which we are familiar.

At this point, however, we come to the parting of the ways. We must make a basic choice between two types of decisions, or of agencies. As "types," these may be tagged "judicialized" and "politico-bureaucratic." The former preserves the essential elements of the judiciary as it has evolved in our governmental history, although modified in important respects, as indicated in a preceding section. The latter approximates the administrative method in that it is subject to political control; and, unless judicialized, even the commissions under consideration may tend to degenerate into bureaucratic agencies. In brief, we must choose between making these new instrumentalities more like "courts" or more like "administrative departments."

The thesis which we shall support is that, in order to make these bodies at once "scientific"⁴¹ and "impartial"⁴² agencies of regulation, we must judicialize them in general, and in particular guarantee their members independence of tenure. This would seem to be justified by the pragmatic rule for reforms, that they should build upon what has gone before,⁴³ and re-adapt it to meet current needs.⁴⁴ The modifications suggested above aim to inject the "scientific method" into the process. But judicialization means the preservation of the useful elements in our traditional method of judicial enforcement, especially the element of "impartiality." Independence of tenure promotes an attitude uninfluenced by direct pressure from political superiors or "interest groups,"⁴⁵ an attitude which in turn is a prerequisite of the use of the scientific method in decision. The "judicial mind"⁴⁶ is thus a prerequisite of the scientific approach,⁴⁷ and freedom

⁴¹ In a broad sense of the term, which will be discussed later.

⁴² In a relative sense of the term, to be later considered.

⁴³ It is futile to attempt to alter the "behavior patterns" of a people over night. Cf. Dewey, *Human Nature and Conduct*, pp. 106-111, and see all of Part II, section III.

⁴⁴ *Ibid.*, pp. 190-195, and all of Part III.

⁴⁵ Cf. Lippmann, *The Phantom Public*, *passim*, notably chap. VIII; Munro, *The Invisible Government*, chap. VI; Kent, *The Great Game of Politics*, chaps. XLI-XLV.

⁴⁶ Cf. Robson, *op. cit.*, chap. V. This discussion is suggestive, but the author does not sufficiently emphasize the relative character of "impartiality."

⁴⁷ It is, in fact, essentially the same as the "objectivity" which, relatively speaking, the "tough-minded" scientist approximates, as no other type does. See Barry, *The Scientific Habit of Thought*, pp. 26-28.

from political pressure a prerequisite of both.⁴⁸ The "judicial mind" is also a prerequisite of a balanced judgment, which, in the regulation of associated activity, seeks to protect from undesirable indirect consequences particular "publics"—and the as yet inchoate "general public"⁴⁹—without oppressing other "groups."⁵⁰

The first step will be to elaborate the meaning which we give to the term "judicialization," by contrasting it with the "politico-bureaucratic" method. Under the latter will be included, besides decisions by administrative boards responsible to the

⁴⁸ This point will be elaborated below.

⁴⁹ Lippman, *The Phantom Public*, passim; Dewey, *The Public and Its Problems*, passim.

⁵⁰ The particular "public," in Dewey's sense, is neither more nor less "selfish" than the "group" which organizes to resist governmental regulation. Such a public, in so far as it sees its "interest," will itself organize as a "pressure group" to demand regulation, and in its demands may not stop at insistence upon "reasonable" control of indirect consequences, but take a "class view" which threatens the "legitimate" activity of the groups to be regulated. Thus we get the picture of competing "interest groups." The only socially sound test of "legitimacy" is in the light of consequences, and with a view to securing a "working" adjustment of the situation as between competing groups. One of the groups is the "outsiders" whose "interest" is primarily in seeing that there be a working adjustment, and in the most indirect consequences which relate thereto. This we have called the General Public, the most inchoate group of all,—if it can even be called a group, except in crises. Thus we get back to Lippmann's description of present politics. Dewey's presentation rather looks to a future where education will produce more objective attitudes on the part of all concerned. The independent commission is in our present stage a useful tool for the weighing of competing demands and for the securing of at least some attention to the amorphous General Public.

President,⁵¹ decisions by the Chief Magistrate himself, by department heads, by *ex officio* boards composed of several department heads,⁵² and by bureau chiefs. In fact, these several agencies cannot be distinguished by sharp lines. For ordinary purposes the two terms of the hyphenated expression "politico-bureaucratic" cannot be separated. The President acts in technical matters on the advice of department heads. They often act in his name, and in contemplation of law their acts are then his.⁵³ The department head has, on the other hand, to follow in decision the known policies of his chief.⁵⁴ On technical matters he consults his more or less permanent subordinates, who may in turn consult the clerks. The bureau chief is liable to political dictation from his superior.⁵⁵ For our purposes, therefore, we may consider the general politico-bureaucratic method as a "type" to be contrasted with the judicial and quasi-judicial methods taken together as another "type." In this contrast some of the differences will relate to independence versus political control, some to decision by particular persons versus decision by a hierarchy, which is one of the worst features of a bureaucracy.

One more point must be made before proceeding to describe "judicialization." We must remember that

⁵¹ That is, administrative commissions whose members do not have independence of tenure.

⁵² Such as, the Federal Power Commission.

⁵³ Hart, *Ordinance Making Powers of the President*, chap. VIII.

⁵⁴ *Ibid.*

⁵⁵ Cf. Lowell, *Government of England*, I, chap. VIII.

we are dealing with the regulation of private enterprise in the "public interest." We may admit that it is proper for the President or department heads under his control to be granted authority to concretize, by ordinances or specific orders, according to circumstances, various statutes relating to matters primarily of a "political" or "military" nature, or to matters of departmental organization and operation. We may admit also that a special, independent body cannot be set up for the performance of every minor regulatory function which the government undertakes.⁵⁶ That would be impracticable, and might lead to undesirable consequences on several scores.

We do not, therefore, by any means give blanket condemnation to the examples of presidential or departmental co-legislation which are collected in the present writer's *Ordinance Making Powers of the President* and in Professor J. P. Comer's *Legislative Functions of National Administrative Authorities*. We are of the opinion, however, that, where co-legislative power to regulate private interests for public benefit, or quasi-judicial power affecting private interests, is left to political officers or departments, the effort should be made to classify them separately and to cause special knowledge and a judicial attitude to be brought to bear upon their exercise.⁵⁷

⁵⁶ Cf. Robson, *op. cit.*, pp. 299, 303-304, 316-317.

⁵⁷ *Ibid.*, pp. 306-308, 319. Cf. pp. 282-288, 320. Holding political interference to be, in England, a "bogey," Robson does not deal with legal guarantees of independence of tenure.

Setting such questions aside, we hold that the independent, quasi-judicial tribunal is a better instrument for the protection of public interests, without undue hardships upon private or vested interests, than any of the other alternatives suggested; and that in the major problems it ought to be employed.

COMPARISON OF JUDICIALIZED AND POLITICO-BUREAUCRATIC DECISIONS AS TYPES

We may enumerate the leading factors in the generalized contrast as follows:⁵⁸

(1) Judicial officers must act personally, and not delegate their responsibility to subordinates.⁵⁹ On the other hand, a political superior charged with making a decision may, and usually does, delegate authority to make the actual decision to his subordinates, who in turn may delegate it to those still further down in the hierarchy. In the judicial process, the parties in interest are able to face the person or persons making the final decision, whereas in the administrative process this is not ordinarily possible, and it may not even be known who it is that actually decides the matter. This inability to observe administration in the making makes it easier for the public

⁵⁸ In this section the author has drawn freely upon Robson, *Justice and Administrative Law*, to which he desires to make especial acknowledgment.

⁵⁹ Robson, *op. cit.*, pp. 67-69.

interest to be lost sight of, and for partiality as between private interests to creep into decisions.⁶⁰

Both the Interstate Commerce Commission and the Federal Trade Commission in this respect seem to stand midway between judicial and politico-bureaucratic bodies.^{60a}

(2) The requirement that no judicial officer sit in a case in which he has a direct or indirect financial interest, or any other substantial interest which would "disqualify" him, is designed to protect, against the cruder forms of partiality, both the public interest and the vested interests concerned. In general, there are less stringent rules concerning the personal interest of the administrator than of one acting in a judicial capacity.⁶¹

An incident brought out in the Senate Tariff Commission Hearings of 1926 is in point. When the question arose whether Commissioner Glassie should participate in the Tariff Commission's report to the President on sugar rates, because of the fact that his wife owned about \$10,000 worth of sugar stock, Commissioner Culbertson communicated with Chairman Meyer, of the Interstate Commerce Commission, as to the practice of that body. In Chairman Meyer's

⁶⁰ Ibid., pp. 74-77. Cf. Hewart, *The New Despotism*, pp. 43-44, and all of chap. III ("Administrative Lawlessness"). On the re-delegability of executive power see Fairlie, "Administrative Legislation," in *Michigan Law Review*, XVIII, 181.

^{60a} See Freund, *Administrative Powers Over Persons and Property*, secs. 17 and 18; Interstate Commerce Act, secs. 17 and 20(10); Rules of Practice of Federal Trade Commission.

⁶¹ Robson, *op. cit.*, pp. 58-66.

reply we have a statement of the practice in our oldest federal regulatory commission:

. . . . A general statement in reply to your inquiry would be something like the following:

No member of the commission participates directly or indirectly in the disposition of any matter with which he has theretofore been connected, or in which he has an interest, financial or otherwise, directly or indirectly. This has been the rule as long as the commission has been in existence. The wisdom of this rule is obvious.

You ask for illustrations. The following occur to me at random:

A Commissioner refused to participate in a case—

(1) Involving rates on radiators, because a member of his family owned a small amount of stock in a radiator company.

(2) With which he had been connected as a member of a state commission.

(3) Because a relative by marriage purchased the output of a plant which was one of many plants concerned in the case.

(4) Because a brother had been an officer in an organization which was one of 20 or more complainants. . . .⁶²

(3) A judicial or quasi-judicial body may act only after the elementary procedural guarantees of notice and a hearing have been satisfied.⁶³ Political decisions by ordinary administrative methods range all the way from those providing no hearing at all to those where the hearing is nominal. The conditions of administration are such that the “pro-

⁶² Hearings Before the Select Committee on Investigation of the Tariff Commission, United States Senate, 69th Congress, 1st sess. (Washington: Government Printing Office: 1926), Part 3, pp. 284-285. The practice seems thus to go beyond the requirement of the Interstate Commerce Act.

⁶³ Robson, *op. cit.*, pp. 74-77. But see note 60a above.

cedure " is of a relatively arbitrary character. The bureaucratic or political mind—which are alike at this point—tend to regard procedural limitations as necessary evils. Where this is otherwise, the officials concerned are actually on the road to "judicialization," whether nominally judicial or not.

(4) "Judicial" bodies develop a regular procedure to the end that decision be made "according to evidence." This is no less so of "quasi-judicial" boards, commissions and officers, although for them such procedure should not be too rigid or over-technical. By way of broad contrast, the relatively summary character which political decisions may take on makes decision without evidence or even against evidence not unlikely.⁶⁴ At least there is no check except judicial review, whereas judicial bodies by their procedure tend to develop checks upon their own action.⁶⁵

(5) The criteria for selection⁶⁶ by the appointing authority tend to differ for the two sorts of officers. Those who are appointed to judicial office are usually trained in the law or in the special economic problems to come before the body, men of sound judgment as well as unquestioned integrity, and often men of exceptional "impartiality." This is, indeed, an essential factor in making these quasi-judicial

⁶⁴ Ibid., pp. 77-81.

⁶⁵ Freund, "The Substitution of Rule for Discretion in Public Law," in *American Political Science Review*, November, 1915.

⁶⁶ Robson, *op. cit.*, pp. 319-320.

bodies the sort of agency herein advocated.⁶⁷ Higher administrative officials, on the contrary, are necessarily chosen in large measure on account of dominant political considerations. Political expediency may give us Falls and Daughertys in the Cabinet, and often does give us mediocre men not adequately trained in the subjects with which they will have to deal. In so far as the "spoils system" is operative, this applies also to officials of lower rank. The result is that the technical knowledge for decision is furnished by clerks, while final decision may be based upon "pressure" from interested groups.⁶⁸

(6) Judicial officers are protected by the guarantee of legal immunity from personal responsibility for their decisions, and a large measure of political immunity from partisan attacks in Congress, in campaign debates, and in the press. This latter probably holds more largely of appointed, than of elected judges and quasi-judicial commissioners. Administrative officers, however, in varying degrees, have greater personal liability for *ultra vires* or illegal action, and are liable to free partisan criticism for their decisions.⁶⁹ This is one phase of the "inde-

⁶⁷ See Hearings cited above in note 62, *passim*. The purpose of "government by commission" can be defeated by the selection of unfit persons, perhaps more easily than in any other way.

⁶⁸ Such pressure cannot ordinarily be exerted on independent judges or commissioners, though these may be *selected* or refused reappointment because of their *known* personal bias in favor of doctrines and policies which please the appointing official.

⁶⁹ Robson, *op. cit.*, pp. 50-58. But see p. 321. We do not insist that the members of an administrative tribunal should have so complete a personal immunity as judges, but that their immunity should

pendence " of judicial officers, which we hold to be a prime necessity if they are to decide in the " judicial spirit."

(7) An ordinary judge or court acts only upon complaint of persons having a material interest, or of the prosecuting authorities of the administration acting as agents of " the public." This is to prevent the judge from being placed in the position both of accuser and judge. An administrative officer, on the contrary, is both the initiator of action and the deciding authority.⁷⁰ This is one justification for the review of his decision by the judiciary. Mr. W. A. Robson holds that regulatory commissions should, in this respect, be assimilated to courts. The criticism by Mr. Henderson ⁷¹ of the dual rôle of accuser and judge played by the Federal Trade Commission led that body to separate these functions in its staff organization.⁷² It must be remembered that one reason for the establishment of regulatory commissions was the inadequacy of enforcement prior to their establishment. That is why they have often been given such a dual rôle. Perhaps all we can demand is that the staff of the given commission be divided into prosecuting officers and officers to hold preliminary hearings. The commission can lay down general rules to guide the former branch of its staff,

be greater than that of mere administrators. Another interesting point is brought out in Willis, *The Federal Reserve System*, p. 874 (" Social Status of the Board ").

⁷⁰ Ibid., pp. 61-64, 69-74. Cf. Dickinson, *op. cit.*, p. 24.

⁷¹ *The Federal Trade Commission*, pp. 83, 84, 327-329.

⁷² See its *Annual Report*, 1929, Part II.

and can allow the latter branch to hear the report of the former in order to determine whether to return, as it were, a "true bill." Then it will act as judge. The ideal, however, would be to separate completely the functions of prosecution and adjudication, leaving the latter only to the commission. This is desirable, because it is closely connected with "judicial spirit" in which the commission's functions are supposedly approached.

(8) Judicial decisions are final and authoritative, except in so far as the system allows appeal to a higher court⁷³ within the judicial hierarchy. A politico-bureaucratic officer is subject to the orders of his superior, and liable to removal by his superior. His decisions may, therefore, frequently be dictated from above upon the basis of political expediency or favoritism. There would seem, therefore, to be the need that they should not be accepted with the same degree of finality, but should be inquired into by the courts with considerable care and upon more grounds than decisions of a lower court.⁷⁴ It must be admitted, however, that practical necessity has compelled the courts to accept as final important "determinations" of administrative authorities acting under legislatively vested powers.⁷⁵

As for quasi-judicial bodies, in so far as they are judicialized, their decisions should, in general, have

⁷³ Robson, *op. cit.*, pp. 82-87.

⁷⁴ *Ibid.*

⁷⁵ Willoughby on the Constitution, 2d ed., 1929, III, 1660 ff.

at least the effect of those of a lower court."⁷⁶ Finality of decision strengthens the prestige of a tribunal. Moreover, a specialized commission is often, as we have seen, in a better position to decide a technical matter than an ordinary court of "general" or unspecialized jurisdiction. Furthermore, the independence of direct political control which such a tribunal should enjoy will establish conditions under which it can be "impartial" in the same sense in which an Anglo-American judge is impartial.

(9) Finally, judicial officers are, or should be guaranteed "independence of tenure."⁷⁷ This means, in general terms, that they are not liable to removal by "superior" officers, or by a popular "recall of judges." Those coming under Article III of the Federal Constitution are appointed, and their tenure is "during good behavior." This means they are liable to removal only upon impeachment by the House of Representatives, followed by conviction by a two-thirds vote of the members present in the Senate.

But we must recognize different degrees of independence of tenure which range below tenure during good behavior. There is certainly a relative independence when the officer is chosen for a fixed term of years, and liable only to impeachment and, let us say, to removal by a joint resolution of Congress, after notice and a hearing during such term. Such is the

⁷⁶ Robson, *op. cit.*, pp. 82-87.

⁷⁷ Cf. *ibid.*, pp. 43-50.

independence of the federal Comptroller General,⁷⁸ at least, if the statute establishing that office is in this respect held valid. Even the power to fail to reappoint might affect the appointee's decisions, in the latter part of his term. But provided the term is long enough, this degree of independence is ordinarily sufficient to prevent direct pressure, especially since both the appointee and the President might under such circumstances develop the habit of regarding the office as "judicial" in character. Constitutional morality will probably tend in such cases to operate to prevent abuses.

We may mention a still lower order of independence. This is where the officer is subject to removal, but only for specified causes, after notice and a public hearing, and upon grounds publicly set forth in writing. In such cases, finality of decision lies in the President, and no court will go back of his act of removal, provided he has given notice and a public hearing, and has stated grounds for removal in a public document. There is here nothing except constitutional morality, and the liability to public criticism to which an arbitrary President would expose himself, to prevent his removing a federal commissioner because he disliked his decisions. But in all probability these would be powerful checks in comparison with the absolutely arbitrary power of the President to remove such commissioners for any reason he pleased, which is, in effect, the theory set forth by Mr. Chief Justice Taft in the Myers case.

⁷⁸ U. S. Compiled Statutes (1923), pp. 8-12.

This theory would almost assimilate such commissions to the politico-bureaucratic status. Officers having such status are liable to arbitrary removal, and it has now been accepted in law and in practice that this implies a duty on their part to act in conformity with the will of the President. That is to say, with reference to department heads and other political appointees of the President, the power of removal has in practice come to be regarded as a "sanction" for a recognized and legitimate power of direction and supervision.⁷⁹

There are several reasons why the confirmation of an arbitrary presidential power to remove interstate commerce commissioners would not entirely reduce them to the politico-bureaucratic status. The first is the fact that such a body has several members. It would be more difficult for the President to dictate decisions, because the application of his "sanction" might involve the removal of several members at once. Any board has more weight than a single individual directly and personally subject to another's orders.⁸⁰

The importance of the first reason is strengthened by the existence of the second. The Chief Justice admitted that the President should not interfere with the decisions of a quasi-judicial body, but said he might remove a member afterwards because he

⁷⁹ Hart, *Ordinance Making Powers of the President*, pp. 188-197.

⁸⁰ *Ibid.*, pp. 196-197.

thought such decisions unwise.⁸¹ That this power would result in the member's being influenced by presidential opinion seems highly probable.⁸² Nevertheless, the Interstate Commerce Commission, at least, has behind it such a tradition of independence that a President who treated it like his mere agency would undoubtedly be severely criticized.⁸³ The public recognition that it is a "quasi-judicial" body would prevent complete presidential domination, or so it would seem. Yet even here there would be no certainty. The Tariff Commission was meant to perform its investigatory functions in a judicial spirit. But both Harding and Coolidge seemed to regard it as primarily a presidential agency.⁸⁴

Finally, in so far as the other factors of judicialization were put into effect, presidential dictation would tend to be checked. These factors would probably tend to make the President regard commissioners as in some sense like "judges," and would tend to strengthen the judicio-scientific attitude on the part of the members.⁸⁵ Experts acting after no-

⁸¹ See the opinion of the Supreme Court in *Myers v. United States* (272 U. S. 52).

⁸² In other words, the distinction of Mr. Chief Justice Taft seems to be based upon a false psychology. But see note 83.

⁸³ Constitutional *mores* may build up habit patterns of self-restraint. But, as we expect to show in chap. III, constitutional *mores* may, instead, sanction presidential interference in some cases.

⁸⁴ See chap. III below.

⁸⁵ See the attitudes of Commissioners Costigan and Lewis as contrasted with those of Commissioners Glassie and Marvin, in regard to the Tariff Commission. Hearings, cited in note 62 above. This was, of course, in large measure a difference of viewpoint as be-

tice and a hearing with no power vested in the President to revise their decisions, would likely tend to resist direct interference by the President.

This conclusion is not refuted by the fact that both Harding and Coolidge regarded the Tariff Commission as a mere presidential agency.⁸⁶ The Commission has no power of decision, but merely collects data for presidential decision. The attitude of these two Presidents was in part made possible through the character of their appointments;⁸⁷ and it must not be forgotten that it was resented by some commissioners. Nor was public opinion as yet prepared to make the tariff a non-partisan question. Under such unfavorable conditions, perhaps no scheme for judicialization could work. Would it not have had a fairer chance if the independence of members of the Commission had been legally guaranteed?

Thus we do not claim that it is an absolute "law" of political science that the provision of *legal* independence of tenure either guarantees or is a prerequisite of independence of judgment. What we do postulate is that, under American conditions, it is

tween two groups on the same commission. Yet it suggests that a judicial attitude can resist presidential interference. And it seems reasonable to suppose the partial judicialization of the Tariff Commission had something to do with calling forth the reactions of Messrs. Costigan, Lewis, and Culbertson. See chap. III below for some details on this subject.

⁸⁶ Note that the President in this case had himself the last word in decision, so that the analogy is suggestive rather than exact. Each situation is, in matters like this, apt to be in important respects unique, and we cannot profit by over-generalization.

⁸⁷ See note 85 above.

the safest course to take, or at least that this course should be open to Congress.⁸⁸

INDEPENDENCE OF TENURE IN RELATION TO THE SCIENTIFIC AND JUDICIAL HABITS OF THOUGHT

Since the postulate just laid down is the key to our constitutional theory which is to follow, we must examine it in somewhat more detail. In regarding the administrative tribunal as a modified trial court which should be judicialized, we have implied a two-fold aim or objective. This is to establish conditions favorable to the development of the scientific as well as the judicial habits of thought on the part of these tribunals.

This is not to imply that the scientific habit of thought is unrelated to the judicial. Let us examine each of these concepts, in order to show their relation to each other and to independence of tenure.

Various definitions have been urged for the term "science,"⁸⁹ and most of them are useful for one purpose or another. For our present purpose, we need a general definition which will emphasize the common factor between the activity⁹⁰ of a physicist and that of an investigator of social phenomena when at his best. This is found in the description of the "scientific habit of thought" which is given by Professor Frederick Barry in his work by that title.

⁸⁸ Cf. Robson, *op. cit.*, pp. 46 ff.

⁸⁹ For example, some insist that science implies the measurement of phenomena. On this see Lewis, *The Anatomy of Science*, p. 6.

⁹⁰ Barry, *The Scientific Habit of Thought*, p. 10.

Starting with William James' distinction between the tough-minded and the tender-minded,⁹¹ Barry proceeds:

The pursuits of these tough-minded people are various and conflicting. In the past they have recognized among themselves no very warm and intimate consanguinity; many of the most bitter struggles which have marked the spiritual progress of mankind have been fought out inevitably among them, and their occasional cooperation has been and still is in large measure merely opportune; but with the slow maturity of their characteristic habit of thought, they seem at length to have recognized in it a common possession: the habit of devotion to and propitiation of "the God of Things as They Are." This habit provokes the investigation of facts alone and compels an ever increasing development of rational acumen and unemotional detachment. The knowledge which it yields, rid of all its accidental characters, is now commonly called science; and whatever seems to partake of its quality is called scientific. Even when these words are used carelessly or in error, they signify the belief or pretension that whatever is thus designated is, in fact, the outcome of rational and dispassionate investigation.⁹²

His [the scientist's] solitary purpose is to know; his only passion is that of discovery.⁹³

But he does not seek to discover by pure ratiocination.

By his singlemindedness in the search for new knowledge and by his indifference to the practical results of his work, that is, by his motive, the scientist allies himself with the philosopher and the scholar rather than with the man of affairs; but by his method, which has been learned in the

⁹¹ Ibid., p. 8.

⁹² Ibid., p. 9.

⁹³ Ibid., p. 18.

rough school of arduous experience, he is more closely in accord with the practical man.⁶⁴

The philosophy of science, which lies back of the scientific method, is described by Barry as follows:

First, that all thought whatever is derived from some phase of common sense, the understanding of man in action; second, that thus far every attempt to transcend the world of experience which common sense describes has met with failure, that all the thought which such attempts involve is couched necessarily in the imagery of these experiences, and that no system of religion or philosophy can do more in an intellectual way, therefore, than to elaborate diverse schemes of its conceptual coordination; third, that among these schemes, that of matured common sense itself alone is possibly descriptive of every phase of experience, since from the manner of its development it alone serves the necessities of actual living, and since for reasons already assigned all other schemes of correlation must be stated in its terms; fourth, that since the relatively undifferentiated complex of diffuse awareness is that from which all postulated ultimates spring by the imaginatively metaphorical development of some aspect of its common-sense elaboration, this is the only possible basis for any intellectual synthesis, whatever the will may demand or require; fifth, that if the intellect itself demands an ultimate, the conception of crude experience will best meet its needs; but sixth, that this conception like every other which is transcendent of actuality is quite unthinkable, and, therefore, negligible; and seventh, that consequently the ultimate has no legitimate place in knowledge, whatever may be its function in hope and faith; so that, whatever belief may postulate concerning it, in science, phenomena, which may be interpreted as its actual manifestation, alone have place. It follows, eighthly and penultimately, that there is no absolute

⁶⁴ Ibid., p. 28.

knowledge properly so called; that all scientific truth is relative, its only criterion being general consistency of experience; and that since experience grows, this truth is also tentative and provisional, never final. Ninthly, and lastly, there follows an important corollary: that for identical reasons all of the preceding conclusions are likewise provisional; which makes the scientific attitude in generality, as well as in detail, one of completely suspended though obviously active judgment.

But furthermore—postfinally, if one dares to be ultra-logical—another corollary may without harm be stated; that the whole of the preceding exposition may be considered tentative, since it cannot be presumed to be based on an exhaustive analysis of scientific opinion, and has not been subjected to more than partial verification.⁹⁵

This is the viewpoint of Skeptical Empiricism, “and its criteria of method and judgment are those of Pragmatism.”⁹⁶

Empiricism means that habit of thought or any doctrine it may formulate, which derives all knowledge from experience it restricts the field of knowledge to the actual, and consequently fails to give the support of reason to the most compelling of all our hopes and aspirations. . . . The scientific purpose is exclusively the attainment of dependable knowledge. The scientist, as scientist, is interested in nothing else. . . . Consistency in thought and action, which is to say consistency in experience as a whole, [is] the sole criterion of truth; and experience, therefore, the source of all knowledge. . . . No postulate has any compelling authority, but is merely a point of view.

Pragmatism means, most broadly speaking, the acceptance as truth of all generally consistent statements of relation in the description of experience. Now, since experience is not postulated to be indubitably ultimate, this truth is not con-

⁹⁵ Ibid., pp. 45-47.

⁹⁶ Ibid., pp. 49-64.

sidered absolute, but relative. Since, also, experience is continually being elaborated, it is not fixed but changing; and is, therefore, in any particular aspect, tentative. Furthermore, it is never certain, but at best probable. . . .

In the pragmatic view an idea is true in so far as, and so long as, it works. This commonest expression of the pragmatic attitude is often absurdly misunderstood. It does not mean that because an idea is useful, or personally acceptable, consoling or gratifying, it is by that token true. The workability of an idea . . . must be demonstrated in every sort of experience to which the idea is applicable. . . .

An idea which is generally inconsistent with experience and, therefore, fails to work, is false. But it may also happen that an idea is inapplicable in action: in this case it is, to the pragmatist, neither true nor false, but negligible. And finally, it may happen, and has happened more than once in scientific experience that two opposed representations applicable to the same set of relations are equally consistent, after their implications have been extensively developed. In this case, either may be considered true for the time being; and if for practical reasons a choice must be made between them, it will be made wholly on grounds of expediency. The usual choice in such emergency is the simpler idea, since this serves economy of thought. . . . The suspended judgment, which the pragmatic attitude demands, and which is the very essence of scientific thought . . . is acquired with great difficulty and is seldom sustained beyond the range of restricted fields of thought. . . . The pragmatic conception of truth is primarily a methodological postulate. . . .

All this leads to, and indeed implies Skepticism. . . . The skepticism here referred to is a highly cultivated growth: not the common or garden variety. . . . Nor is it the serious religious skepticism. . . . Philosophical skepticism appertains exclusively to the theory of knowledge . . . it is . . . a methodical discipline of tentative judgment—ex-

plicitly, the philosophy of caution. . . . Science refuses acceptance to any truth derived exclusively from authority. . . . Science has learned, through error, that the most destructive influence within her domain is emotional bias of any sort. . . .

We would not minimize the difficulties in the way of the application of scientific habits of thought by administrative tribunals. We merely hold that an approximation of the scientific approach is, within the limits set by legislative expressions of basic policy, an immediate desideratum. This means the selection as members of such commissions of men who are scientifically trained with reference to the particular field involved, and the establishment of conditions which will enable them to relate decisions to the "facts," and to build upon cumulative experience. In so far as this is done, the influence of emotional bias will be minimized,⁹⁷ and the views which as "principles" are brought to bear upon decisions will tend to be regarded not as absolute truths but as tentative hypotheses to be tested by experience.⁹⁸

To this end the following factors will presumably contribute: permanent experts; specialization; adequate investigatory facilities; finality of decision on the technical aspects of problems.⁹⁹ And the scientific

⁹⁷ Freund, "The Substitution of Rule for Discretion in Public Law," in *American Political Science Review*, IX, 686.

⁹⁸ Dewey, *Human Nature and Conduct*, pp. 240-241; Dewey and Tufts, *The Influence of Darwin on Philosophy and Other Essays*, pp. 150-153.

⁹⁹ See above, the section of this chapter relating to the needed modifications of the traditional trial court.

method will tend to be employed. This method, which corresponds to the scientific habit of thought, is best summed up by Dewey in his account of reflective thinking in action. First, there is a "felt difficulty," or problem. Next comes the location and definition of this difficulty. Thirdly, there is the suggestion of a possible solution. Fourthly, there is the development by reasoning of the bearings of this suggestion. And finally, there is further observation and experiment leading to acceptance or rejection of the suggestion; that is, to the conclusion of belief or disbelief, or what is called verification in experience, by the pragmatic test, and through trial and error.¹⁰⁰

Two difficulties at once appear. The first is that, when an administrative tribunal arrives at a tentative conclusion, which is embodied in a decision, there are important social consequences. It can verify its hypotheses only by experimenting with social control. The physicist hits upon an hypothesis, and tests it out without affecting seriously and directly the interests of others.

The second difficulty is that the administrative tribunal deals with problems where emotional bias¹⁰¹ plays an exaggerated part. A commissioner finds it more difficult than a chemist to discount his own prepossessions,¹⁰² and is liable to political pressure from groups whose interests will be affected by his

¹⁰⁰ Ratner, *Philosophy of John Dewey*, pp. 168-178.

¹⁰¹ Cf. Lippmann, *Public Opinion*, chap. VI, dealing with "stereotypes," and Rice, *Quantitative Methods in Politics*, pp. 51 ff.

¹⁰² Cf. Reeves, *La Communauté Internationale*, chap. I.

decisions. This is in part caused by the obstacles in the way of the development of the techniques¹⁰³ for the investigation, and especially for the measurement,¹⁰⁴ of social phenomena, as well as by the time element in the testing of governmental experimentation in social control.¹⁰⁵ Neither the administrative tribunal nor those to be affected by its decisions can be "indifferent to the practical results of its work," nor view the problems before it with "unemotional detachment." Even the chemist brings assumptions to his laboratory.¹⁰⁶ But he is checked by elaborate

¹⁰³ The "controlled experiment," while not entirely inapplicable to social situations (see Rice, *Quantitative Methods in Politics*, pp. 251 ff.), cannot be applied to the more important problems. See Keyser, "On the Study of Legal Science," in *Yale Law Journal*, XXXVIII, 413.

¹⁰⁴ The statistical method is, in practice, difficult to apply to social phenomena.

¹⁰⁵ The tribunal must wait a long time to discover whether its hypotheses are "working." The physicist can immediately set up an experiment to test his conclusions. The difference is relative, but none the less important; since, in the meanwhile, the decision of the tribunal is having important social consequences, and the fact that this is so makes the prepossessions of its members a matter of social significance and stimulates the exertion upon them of political pressure. The lack of "certain" knowledge is thus the excuse for appeal to rationalizations of emotional slants and of class interests in the form of deductions from accepted "principles." The modern physicist's techniques, his ability to employ such techniques at once in the testing of results, coupled with the indirect relation between his work and the work-a-day world of affairs, makes the tentative character of his hypotheses less dangerous. If they "work" for the immediate purpose in hand, their transformation over a period of time does not matter.

¹⁰⁶ He must have some tentative theory in mind, else he could only sit idly waiting for something to happen. Instead, he hits upon an idea and proceeds to test it out pragmatically.

techniques,¹⁰⁷ and relatively undisturbed by emotional loyalties and aversions.

It is at this point that the judicial habit of thought connects up with the scientific habit of thought. The former does not mean complete freedom from all opinions and prepossessions. Jurors are the only persons who possess this dubious virtue. It is meaningless to insist upon examination of the "facts" with absolute "impartiality." For even the "facts" of the physical sciences are our interpretations of the data of experience relative to particular purposes.¹⁰⁸ A purely blank mind could do no thinking. Perfect "objectivity" in the investigation of social phenomena is still less obtainable.¹⁰⁹

Rather does the "judicial mind" mean an attitude that involves, *inter alia*, a conscious desire and deliberate effort to avoid the cruder forms of favoritism; to be uninfluenced by any form of political pressure; to view a problem with a sense of detachment from the strife of conflicting interests;¹¹⁰ to base decision upon reasoned judgment¹¹¹ in which the bases of the judgment are subjected to conscious examination and criticism;¹¹² and to relate decision

¹⁰⁷ Dewey, *The Public and Its Problems*, pp. 1-8.

¹⁰⁸ Barry, *op. cit.*, chap. II, on "The Nature of Fact."

¹⁰⁹ For here "visceral behavior" is at the maximum. See Watson, *Behaviorism*, and *Ways of Behaviorism*.

¹¹⁰ See article cited in note 97.

¹¹¹ See Dewey's account of "reflective thinking" in his *How We Think*, and in *Human Nature and Conduct*, pp. 168-277.

¹¹² See Holmes, "The Path of the Law," in his *Collected Legal Papers*.

to the evidence,¹¹³ and to the best obtainable opinion as well as to cumulative experience. This relative impartiality is one of the supreme assets of civilization.¹¹⁴

As thus defined, the judicial attitude is, at its best, nothing more nor less than the scientific attitude in the field of practical affairs. "Pure" science is more or less protected by its techniques¹¹⁵ and by the emotionally neutral subject-matter with which it deals. It is possible only if emotional bias and outside control are eliminated; but that is relatively easy. Not so with attempts at the scientific approach to governmental regulation. Here "impartiality" cannot be assumed. It must in every possible way be safeguarded.

These safeguards involve what Professor Freund describes as the inherent—we should prefer to say internal—"checks which in professional bodies evolve principle out of constantly recurring action."¹¹⁶ But they also involve the guarantee of independence of judgment. No possible method can be devised for eliminating "discretion" from the decisions of administrative tribunals. The goal is to bring it about that this discretion will not be arbitrary:¹¹⁷ that it will not be exercised upon the basis of the emotional bias of the members on the one hand,

¹¹³ See Robson, *op. cit.*, pp. 77-81.

¹¹⁴ Cf. *ibid.*, chap. V.

¹¹⁵ Cf. Dewey, *The Public and Its Problems*, pp. 1 ff.

¹¹⁶ See note 97.

¹¹⁷ Robson, *op. cit.*, pp. 228 ff.

nor of pressure from a political superior or interest-groups on the other. Because the scientific approach to economic problems is difficult, the tribunal has to hold the balance between the public interest which it is set up to safeguard and the vested interests of the competing groups which it is to control. Its criteria will in a general way be the legislative abstractions interpreted in the light of the dominant opinions of the era.¹¹⁸ Within these limits it should relate decision to the facts by scientific study and experimentation, and at the same time look to the establishment of readjustments between the conflicting interest-claims involved.¹¹⁹ It must weigh rather than ignore the human elements in the situation. Without independence of judgment this difficult task will prove impossible. This independence of judgment it is essential to safeguard.

Among the safeguards which we find that experience suggests are a plurality of "judges" instead of a single commissioner; decision by men who have no substantial interest at stake; the guarantee of notice and a hearing; decision by known persons

¹¹⁸ Cf. Holmes, *The Common Law*, pp. 1-2, 35. In his dissenting opinion in *Lochner v. New York* (198 U. S. 45, 74), Mr. Justice Holmes said: "Every opinion tends to become a law." Cf. the implications of his dissenting opinion in *Adkins v. Children's Hospital* (261 U. S. 525-567).

¹¹⁹ We must be constantly reminded of the illusory goal of "letting the facts speak for themselves." See on this important point Dewey, *The Public and Its Problems*, pp. 5 ff. This goal is illusory in the physical sciences, if by it is implied that there the logical process gives us ultimate "laws" of nature, or even that the simple facts of a concrete experience can be accurately described in words. Still

rather than by an administrative hierarchy; and independence of tenure.¹²⁰

For our purpose the matter may be stated as follows: The application of the scientific method necessarily implies the scientific habit of thought. For regulatory problems to be approached in this way emphasis must be placed upon the judicial spirit of decision, which is aided by the application of the judicial methods. The judicial spirit involves independence of judgment, of which independence of tenure is a prerequisite.

That the last proposition is true is a lesson of common experience. Upon it are based the tenure during good behavior of English, and American federal judges. The question is one of psychology and concerning it a distinguished psychologist has written as follows:

I am afraid psychology as such has made no studies of the problem. . . . There is not the least doubt that you are right. No man can be free to make honest decisions if any one above him has the power to remove or even to fail to reappoint when he does not act in accordance with the appointer's interest.

less is this so in the social sciences. Says Dewey: "The prestige of the mathematical and physical sciences is great, and properly so. But the difference between facts which are what they are independent of human desire and endeavor, and facts which are to some extent what they are because of human interest and purpose, and which alter with alteration in the latter, cannot be got rid of by any methodology." *The Public and Its Problems*, p. 7. The human purpose, which is a factor in social phenomena, cannot be ignored by an administrative tribunal without its being unconscious of its own prepossessions and without its neglecting part of its data.

¹²⁰ See above, the section of this chapter dealing with "Comparison of Judicialized and Politico-Bureaucratic Decisions as Types."

I can think of no actual investigation, and of no special use of the problem in theory that would be more helpful than common experience. The theory would do little more than embody that experience in any case.¹²¹

It might be said that American Presidents would make as "honest" decisions as members of a board; and that no President would have "interests" against the public interest which would cause him to dictate decisions. But the point is that the President is, after all, a political officer, that his methods and approach are not those of a judge, and that his interference on political grounds would tend to nullify the desired approach from the judicio-scientific viewpoint. If the members of the tribunal were actually responsible to him, they would tend to be, more or less unconsciously, influenced by his opinions.

ANSWERS TO OBJECTIONS TO GOVERNMENT BY
INDEPENDENT COMMISSIONS

In concluding our generalized picture of administrative tribunals, we may briefly anticipate certain objections which are sure to be raised:

1. There is a traditional Anglo-American antipathy¹²² toward any agency which smacks of an "administrative court" or "administrative law." Does not Dicey's "rule of law" involve the sub-

¹²¹ Professor W. R. Pillsbury, of the University of Michigan, in a letter to the author dated November 25, 1928.

¹²² Cf. Dicey, *Law of the Constitution*, chap. XII; Bryce, *Modern Democracies*, I, 277-278.

jection of all interests and all men to the adjudication of the "ordinary" courts of justice?¹²³

This objection is emotional in character. The idea that only a "regular law court" will employ the magic of "judicial impartiality" rests upon the false premise that those who are called "judges" are a peculiar species who are set apart. Judges do not cease to be men; and men who are not judges may act as "impartially" as those who are. A judge by any other name will decide as "justly."

The judicial spirit was developed by the English Court of Chancery; and even Dicey admits that the French Council of State has been "judicialized."¹²⁴ More recently, Mr. Robson has emphasized what Dicey's prepossessions kept him from seeing: that a judicialized administrative tribunal is no more objectionable than a "court."¹²⁵ More accurately, it is objectionable only to "vested interests" which oppose regulation in the "public interest," or to traditionalists like Mr. Dicey.

The "judicial mind," then, is not a result of transubstantiation. It is the consequence of a gradually developed set of habit patterns, which have, so to speak, crystallized into custom or constitutional *mores*.¹²⁶ Furthermore, it has not been, and need not be, confined to persons denominated "judges." The

¹²³ Dicey, *op. cit.*, p. 189.

¹²⁴ *Ibid.*, 8th ed., pp. xliii ff.

¹²⁵ Robson, *Justice and Administrative Law*, *passim*.

¹²⁶ Cf. Dewey, *Human Nature and Conduct*, pp. 58-74.

scientist takes it for granted in his work,¹²⁷ and so, in a less degree, do administrative¹²⁸ officials in certain classes of situations.

The objection to adjudication by these "special" tribunals would have merit if they were reduced to the politico-bureaucratic status. But our very contention is that these bodies can and should be judicialized, especially that they be given the independent status of courts. If this is done, the objection is reduced to logomachy. For, as William James said, if two concepts lead to the same human consequences, they are pragmatically to be identified.¹²⁹

To this assumption that a court and an administrative tribunal can thus, for all important consequences, be identified, we must add one important qualification. Or, rather, we must raise an important question. It seems to be a political fact that the terms "judge" and "court" have become associated with the idea of "the judicial mind" in a way that other governmental agencies have not. Hence they tend to evoke in judges and in the other branches of government, as well as in the public, the habit reactions which make their "judicialization" a reality.¹³⁰ The question is whether the conditioned reflexes stimulated by the term "court" and associ-

¹²⁷ Cf. Barry, *The Scientific Habit of Thought*, pp. 9, 13, 15, 18, 28, 62, and passim.

¹²⁸ Cf. Robson, *op. cit.*, pp. 200, 213.

¹²⁹ Kallen, *The Philosophy of William James*, p. 82.

¹³⁰ This may be conveniently expressed in terms of the "conditioned reflex" as that term is employed by Mr. John B. Watson in his *Behaviorism*.

ated stimuli can be "transferred" to regulatory commissions.¹³¹ The experiment is worth trying; and their formal judicialization, especially the legal guarantee of independence of tenure, is a practicable means of "conditioning" to that end.¹³²

2. The establishment of independent agencies will be attacked by advocates of administrative simplification and integration. Through most of its history, to be sure, the federal government has been characterized by a centralized administration, with the President at the head as administrator-in-chief. The states in recent years have shown a marked tendency to imitate this feature. Those who have sought the enlargement of the governor's power have held up the federal system as a model.¹³³ But the new conditions of the twentieth century have brought a conflicting tendency in the direction of the establishment of more or less independent agencies. A perfectly integrated system is, in its very symmetry, attractive on paper. But the aim of "putting more business into government," desirable as it is in itself, must not blind us to the fact that "efficiency" is but an intermediate end, and that schemes for its increase may defeat the "ultimate" end of protecting "public interests." Independence of judgment overshadows, in certain cases, integration in control.

¹³¹ Cf. Watson, *op. cit.*, Lectures I and II.

¹³² If stimulus A (court) produces reaction X (habits associated with judicialization), by associating A with B (administrative tribunal), B will be made to produce X. Cf. Watson, *ibid.*

¹³³ References on state "administrative reorganization" are too familiar to need citation in this monograph.

This does not necessarily mean the complete destruction of the position of the President as chief of the government regarded as a "business concern." As such, he could still make his recommendations, including the work-program embodied in his budget, to the "board of directors." But control by a politically-minded President may inject into administration "politics" to the detriment of efficiency or of impartiality. Congress should have power to determine the scope of the Chief Executive's supervisory powers.¹³⁴

3. It has been argued that this theory would tend to establish parliamentary government in the place of our separation of powers. But there is no such thing as parliamentary government in general. It means one thing in England, where the cabinet predominates,¹³⁵ and another in France, where groups in the Chamber dominate the cabinet.¹³⁶ The common element is the guarantee of political solidarity between legislature and executive. Our thesis, if applied, would not produce this result. It would enlarge the policy-determining discretion of Congress, and limit, or make it possible for Congress to limit, the supervisory powers of the President. As will later appear, however, our theory of the

¹³⁴ Except, as we shall later point out, in respect of the principal agencies set up to aid the President in the execution of his own independent, constitutionally granted powers. See chap. III below.

¹³⁵ Cf. Low, *Governance of England*, passim.

¹³⁶ Cf. Sait, *Government and Politics of France*, chap. III.

removal power protects the independent constitutional powers of the President fully as much as any other theory.¹³⁷ Nor does it give Congress the power of direct administrative supervision over the independent agencies it may create.¹³⁸ It rather gives them the independent status of trial courts. If our theory proves to "work" satisfactorily, we need not stop to consider whether or not it tends to introduce "certain elements" of parliamentary government.

4. Government by commission is often attacked as bureaucratic. We regard it rather as a safeguard against regulation by a bureaucracy. The "necessary" increase of governmental regulation¹³⁹ means control by a hierarchy hampered by red-tape unless it is placed in the hands of a definite group of independent commissioners acting in the spirit of "judges."

5. It might be urged that our position runs counter to the doctrine that, in a democracy, policy-determination should be in the hands of an elected legislature or under the control of an elected president, while only policy-execution should be left to independent agencies. As the distinction was developed by

¹³⁷ Cf. chap. VII below.

¹³⁸ Our theory, as set forth in chap. VII, gives Congress no power directly to supervise administration, no power to participate in removals, but only power to enact laws governing tenure of office.

¹³⁹ Cf. earlier sections of this chapter. See Hewart, *The New Despotism*, for the contrast between "administrative law" and "administrative lawlessness."

President Goodnow,¹⁴⁰ it was for the purpose of showing that "democracy" did not require the election of officials charged with policy-execution. That the details of policy-formation need be in the hands of elected officials is a thesis that must be tested by its consequences rather than by its deducibility from the dogma of democracy.¹⁴¹ The fact is that, in practice, the line between these two functions cannot be drawn with any degree of exactness.¹⁴²

The same argument can be brought against the exercise by the independent federal courts of discretionary powers involving the gravest questions of public policy. Again, the distinction which is drawn between "popularly controlled" officials and independent officers is seen to be rather artificial. Judges belong to their own generation and tend to apply its dominant criteria to their decisions. *Per contra*, the "control" supposedly exercised by the elected President over departmental decisions is in fact exercised mainly in politically dynamic instances; while his "responsibility to the people" relates mainly to his legislative policies, hardly ever to his particular technical decisions.¹⁴³ This argument thus is reducible to a deduction from a propositional function.¹⁴⁴

6. An objection which takes the form of cynical skepticism, at least supposedly based on common

¹⁴⁰ *Politics and Administration*.

¹⁴¹ This assumes the philosophy of John Dewey.

¹⁴² Cf. Hart, *op. cit.*, pp. 283-285.

¹⁴³ McBain, *The Living Constitution*, p. 116.

¹⁴⁴ Cf. Keyser, *Mathematical Philosophy*, Lecture II.

experience, is well stated in an editorial in the *Baltimore Sun* of April 16, 1929. Discussing Mr. Hoover's plan to create a farm board in order to "transfer the agricultural question from the field of politics into the realm of economics," the *Sun* said:

This assumption is so naive that it is impossible to believe that the President was serious when he gave pen to it. For if there is one thing certain in this world, it is that the politicians will foregather where there is Government money to be spent. And it is equally certain that no board appointed by the President and confirmed by the Senate will, in the long run, be able to keep clear of the politicians and their low tricks. Witness the tariff board, which was to have taken the tariff question out of politics. Witness the Federal Reserve Board, which at this very moment is under political pressure of the strongest sort. Witness the Federal Trade Board (*sic*), which was supposed to be a pure fact-finding body.

The President may be able to appoint a board of experts who don't know and don't care a single thing about politics. The Senate may even confirm such a board. But spending Government money is the very essence of politics, and no way has ever been found to keep the politicians away from their meat.

Our President, we begin to suspect, is an idealist, dreaming impossible dreams.

Our answer to this is, first, that independence of tenure, emphatically declared by law, is the best safeguard against such abuses as are suggested. But, if this is not sufficient, the only conclusion that can be drawn is that those affected by indirect consequences which work to their harm are not as yet sufficiently enlightened to visualize, as a "public," their "in-

terest," nor sufficiently articulate to secure adequate organization of that "interest."

7. Still another objection is that a politically-minded President will appoint to boards which have considerable discretion relative to politically dynamic subjects, men who are known to favor particular theories. This also is hinted at by the editorial quoted above. This seems actually to have happened in the case of the Tariff Commission.¹⁴⁵ The only remedy is again the demand of an alert and effective public, which will develop safeguards in the form of constitutional *mores*. That this danger exists does not mean that the alternatives to an independent commission are preferable or even workable. A board may of course be a more, or a less, effective instrumentality.

8. A final objection rests upon the supposed impossibility of a "scientific" handling of problems regarding which there is no agreement as to the ends to be sought or the principles to be applied. In social investigation and experimentation, we readily admit, the scientific method encounters many more difficulties than in physics or chemistry.¹⁴⁶ But that does not mean we should fall back upon dogmas or formulas.¹⁴⁷ That method, traditional as it is in politi-

¹⁴⁵ Hearings Before the Select Committee on Investigation of the Tariff Commission, United States Senate, 69th Cong., 1st sess., Pt. III, p. 271 and passim.

¹⁴⁶ See above, this chapter.

¹⁴⁷ Cf. Barry, *op. cit.*, pp. 178 ff.; Dewey, *Human Nature and Conduct*, pp. 241-244.

cal behavior, is under modern conditions hopelessly inadequate, as the "new publics" are coming more and more to realize in their groping after effective tools for the protection of their "interests."

For example, the embattled farmers, organized in Congress through the "farm bloc," have become an articulate "group"—a "new public"—which seeks to eliminate the factors in the economic situation producing indirect consequences which are harmful to the "group." But regulation favorable to their "interest" might be so narrowly conceived as to work indirect consequences harmful to other groups or even, in the long run, harmful to the farmers themselves. The net result might indirectly work injury to the other groups in the community. What we get, therefore, is competition among "pressure groups." The desirable end we conceive as a method of adjustment which will "work."¹⁴⁸ In politics, this may better be described by the term compromise, except that compromise approximates stable adjustment in proportion as it is based upon trial and error methods preceded by the collection of relevant data. Compromise by mere political trading and manœuvering, regardless of the facts of the situation, is notably unstable, as the Tariff of Abominations of 1828 well illustrated. The aim should be to forestall the harmful indirect consequences which affect one group for ill without thereby producing serious and harmful indirect con-

¹⁴⁸ Cf. Lippmann, *The Phantom Public*, passim.

sequences for other groups,¹⁴⁹ or for that collection of other groups which Lippmann terms the "outsiders" on the side lines, or the Public with capital letters.¹⁵⁰ The one known method by which there is some chance of attaining this aim is by decision based upon investigation, followed by readjustment in the light of experience, and made by independent experts.¹⁵¹ In the present stage of transition there has not come into being a single, articulate Public. There are only publics plus an embryonic Public hardly worthy of the name. The balance between them can best be held by an independent commission of experts, who seek, within certain broadly defined legislative limits, to work out piece-meal a "solution"¹⁵² by independently applying, so far as possible, the general method of science.

¹⁴⁹ Cf. Robson, *op. cit.*, pp. 244, 247.

¹⁵⁰ *Public Opinion*, and *The Phantom Public*, chap. III.

¹⁵¹ That this is difficult is no argument for falling back upon *a priori* "solutions."

¹⁵² The term "solution" is here used in a relative sense only. The idea that solutions of social problems can be found which, once put into operation, will be final, is a survival of the "rationalism" and the concept of society as "static" which characterized the age of enlightenment. The evolutionary hypothesis, modern psychology, and pragmatic philosophy as represented by Dewey have made this idea appear absurd; yet it still survives in our thought.

CHAPTER III

THE INDEPENDENCE OF OTHER BOARDS, AGENCIES AND OFFICERS

In the last chapter, there was presented a general discussion of the place, in our governmental system, of administrative tribunals exercising regulatory functions. The object of this discussion was to indicate the basis for the contention that, as a matter of policy, Congress should make such agencies independent of the President in their tenure of office.

In this chapter, the attempt will be made to point out the advisability of allowing certain other administrative agencies a like independence of tenure, and of allowing Congress, in the case of still others, in its discretion to provide for their independence. In short, it can be demonstrated that the very idea behind the creation of some of these agencies implies independence of judgment, and hence independence of tenure; while with reference to others, a plausible, but perhaps less conclusive, argument may be advanced in favor of their independent status. In either event, it follows, under our system, that the matter should be left to the policy-determining organ. Whether it is wise, all things considered, to grant independence of tenure in a particular situation must be left to the judgment of Congress in each case as it arises. Congress may sometimes exercise

this discretion unwisely. But, as Bagehot once said, in government, power must be lodged somewhere.¹ Under our system such discretionary powers belong to Congress.

It will not be necessary, in this connection, to give as elaborate a treatment of these other agencies as was given of administrative tribunals. In the first place, the latter constitute the most important sort of independent establishment. In the second place, when once the considerations justifying independent tenure, as applied to such tribunals, have been thoroughly understood, the application of some, at least, of these considerations to these other agencies will the more readily be appreciated. All that this chapter will attempt, therefore, is to list these other agencies, with brief citations from competent authorities of reasons for making them independent; and, negatively, to list certain other agencies which it would not be permissible, without radical changes in our whole constitutional system, for the national legislature to free from complete presidential control. It will thus be the conclusions of this and the preceding chapters which will, in Part III, determine our choice of a theory of tenure of office under the Constitution.

If, under this theory, Congress made all those agencies independent which it may so make, then the executive department would indeed take on a quite different appearance from that which it has

¹ *The English Constitution* (World's Classics edition), p. 195.

had since 1789. But this would not result in an unconstitutional rearrangement by Congress of our whole system. That would follow only if Congress attempted to make independent the principal officers whom it sets up as tools of the President in the exercise of his independent, constitutionally vested powers. The explanation of this distinction will be clearer after a reading of this chapter and of Part III. For it is in Part III that we shall elaborate a constitutional theory of tenure which will allow Congress the discretion which Part I shows to be expedient.

Presidential Agents. Let us, at the outset of this analysis, present the negative side of the picture. There are certain officers who are created as agents through whom the President may perform certain constitutional functions which are by the instrument entrusted to his sole authority. So long as these powers are exclusively his, it would be absurd, as it would be unconstitutional, for Congress to set up agencies with powers related to them and, at the same time, with independent tenure. The question whether these powers should be left to the President without congressional control involves the broad issue between presidential and cabinet government—a question beyond the scope of this study. The existing presidential system being taken for granted, Congress may in no way limit the President's power to remove the Secretaries of State, of War, and of the Navy, ambassadors, other public ministers and

perhaps some other agencies which, on the basis of their duties or some of them, the Supreme Court might place in the same category. In Part III, we shall show that it is possible—though not, we admit, necessary—to deduce from the Constitution a power of Congress to fix the conditions of tenure of all other officers whom it may set up. In this chapter, we are concerned merely with the advisability of allowing Congress this power.

Investigatory Commissions. In the last chapter we classified federal administrative commissions as regulatory, investigatory, and business-operating. With reference to the second class, we may say that, roughly speaking, they fall into two categories: (1) Those appointed by the President as aids² to him in gathering facts and, by interpretation of these facts, in formulating a presidential policy; (2) those set up by act of Congress as “officers of the United States,” to report to that body impartial findings which may aid it in its policy-determining functions,

² These presidential agents need not be “officers,” and often are not. An “officer” is one who has been duly appointed as per the Constitution to an “office” which has been created by law. See Willoughby on the Constitution (2d ed., 1929), III, 1505. Congress may of course create “officers” as presidential aids, as it did in the case of the Director of the Budget. Or the President may, as in the case of President Hoover’s Law Enforcement Commission, set up an investigatory body not composed of officers. In the latter event Congress may vote funds for their expenses. But otherwise they receive no salaries, and they may exercise no “governmental authority,” even in the way of forcing the production of papers or testimony. See 45 Stat. at L., Part I., 1613. Cf. also Wright, *Control of American Foreign Relations*, pp. 119, 249.

or to report to the President findings as a sort of check upon his statutory discretion. Of the former sort, is the Law Enforcement Commission, headed by Mr. Wickersham, which Mr. Hoover appointed soon after he became President. Of the latter sort is the Tariff Commission.

It is only the second category with which we are here concerned; for commissions of the former sort are frankly presidential agencies. But, with reference to a body like the Tariff Commission, many of the arguments advanced in advocacy of the independent position of regulatory commissions apply.

Since such investigatory bodies are created for the purpose of furnishing the facts and scientific conclusions upon which intelligent decisions can be made, it is clearly important that they be made free from partisan influence. If their findings are to be enlightening, then they must be guaranteed independence of judgment, and to that end independence of tenure.³ They differ from regulatory boards chiefly in that their work is preliminary to regulation by other agencies—Congress or President—and does not culminate in authoritative decision by these boards themselves. This difference gives, if anything, added justification for the independence of tenure of their members. For, if these commissions are to be subject to partisan dictation, there is or-

³ See the argument on the relation of independence of tenure to independence of judgment which is given above, chap. II. See also Part II, where the question is asked whether constitutional *mores* are a sufficient guarantee of independence of tenure.

dinarily no excuse for their existence in addition to the existing subordinates of deciding agencies; while, if they are made independent, a leading argument that is brought against regulatory "government by commission" does not apply. That is to say, the fact that popular control, through election or responsibility to a popularly elected President, is absent, has less weight when made into an argument against independent agencies whose sole function is to collect data and make recommendations, than when made against a body endowed with power to decide.⁵

Moreover, where the questions to be decided involve a high degree of judgment, partisan influence is less apt to be exerted if the commission merely lays its findings before Congress than if it has to decide. The Executive is then less tempted to select members with known prepossessions; and the prejudices of commissioners result merely in having both sides laid before the national legislature.⁶

⁴ See the section below on the Tariff Commission, especially the quotation from Professor Taussig there given. See also note 6 below. There are, of course, numerous exceptions to all rules. For example, the President may need and desire a commission of distinguished citizens to aid him in the formulation of a policy in ways a mere fact-finding, subordinate bureau could never adequately serve.

⁵ Whether this argument is to be given much weight in any case is discussed above, chap II.

⁶ "Doctor Taussig. . . . When a commission of such sort has the power, its policy will be affected by the opinion of the commission, and it will cease to be quite a judicial and impartial body, whereas when it is merely a question of putting before Congress the situation as it finds it, with different interpretations on the situation by dif-

The Tariff Commission. Such a commission might be made:

1. A body to gather data for the use of Congress. Drs. Taussig and Page⁷ both advocated this plan before the hearings of the Senate Committee; and this was the actual function of the Commission from 1916 to 1922.⁸

2. A rate-determining body independent of, and unconnected with the President. Before the Senate committee, Mr. Costigan urged: "a permanent, independent, non-political, judicial, fact-finding and rate-deducing tariff commission."⁹ This would make it a body with powers somewhat analogous to those of the Interstate Commerce Commission. Drs. Taussig and Page considered this plan Utopian,¹⁰ in view of the complexities of the tariff problem and its present relation to politics.

3. A body to make investigations for the President in connection with a plan like the flexible tariff provision in the Tariff Act of 1922.¹¹ This is the

ferent persons on the commission, such as you would naturally have, you do not have the same pressure, the same temptation of making a commission all of one cast of mind as you have under the existing situation." Hearings Before the Select Committee on Investigation of the Tariff Commission, Part I, p. 18. Cited below as "Hearings."

⁷ Hearings, Pt. I, *passim*.

⁸ *Ibid.*, p. 31.

⁹ *Ibid.*, Part III, p. 400.

¹⁰ See reference in note 7.

¹¹ 42 Stat. at L. 858. See W. M. McClure, "A New Commercial Policy for the United States," in *Columbia University Studies in History, Economics and Public Law*, CXIV, No. 2 (1924).

present¹² position of the Commission, but it is not satisfactory.¹³

4. A body to make investigations for the President, as his mere agent, without any implication that he ought to follow its findings. This case needs no consideration; for, obviously, it involves no purpose of establishing an independent body. The fact should, however, be pointed out that here there is no excuse for establishing a commission at all. Congress needs only to give existing agencies, such as the Department of Commerce, the duty of aiding the President in collecting such facts as he may need.¹⁴

If the Commission should be made a rate-determining organ, then the conclusion of chapter II on administrative tribunals would in large part apply. If it should be re-created as an agency for informing Congress, this again would imply independence of executive control, or else an existing agency would be all that was required. Speaking of the Tariff Commission as of the period 1916-1922, Dr. Taussig once wrote:

The question at once presents itself, why a separate body for this simple and restricted object [of fact-finding, rather than rate-making]? Could not the task of investigation have been intrusted to existing agencies? Various branches of the Fed-

¹² While this is being written, the Senate is discussing the whole matter. This discussion may lead to important changes in the powers and status of the Commission.

¹³ See reference in note 7.

¹⁴ See note 4 above.

eral Government—the Census Bureau, the Department of Commerce, the Treasury Department, the Interior Department, the State Department, the Federal Trade Commission—were already doing work of this kind why add another? The only possible ground—and this was the decisive ground—was that impartiality was to be guaranteed. The other agencies were subject to the vicissitudes of politics. . . . To secure on this debated and delicate topic data quite unaffected by any bias, and for this only, the commission was set up. Careful provisions were made to insure its non-partisan character. The commissioners were appointed for terms quite unexampled in the United States—12 years as compared with 7 years for the Interstate Commerce Commission and 5 years for the Federal Trade Commission. No more than three of the six members of the Tariff Commission might belong to the same political party.¹⁵

This being so, guarantee of independence of tenure is a proper means to the end of freeing such an investigatory body from partisan pressure.

The flexible provision of the Tariff Act of 1922 was so drafted as to leave ambiguity as to the relation of the Commission to the President. One view of this relation is expressed as follows by Dr. Taussig:

Six years later, in the tariff act of 1922, an entirely new set of duties was imposed on the commission. . . . The commission was given the power, or what was meant to be equivalent to the power, of fixing duties. . . . Duties are to be adjusted on the basis of differences in the cost of production in the United States and competing countries . . . the increase or decrease was not to be more than 50 per cent of the rates of the tariff act of 1922. As is usual in legislation of

¹⁵ Quoted in Hearings, Part I, p. 31.

this type, the delegation of power was in form to the President. It was he who should "upon investigation" order the change. But it was provided that the Tariff Commission should make the investigation, "to assist the President in ascertaining differences in cost," and he was to order no change until after the investigation by the commission. It was designed by the framers of the provision that the commission should virtually be the duty-adjusting body. And the intention was to get something automatic. Ascertain the facts; find whether duties are or are not in accord with the principle of equalization, and adjust accordingly. The mechanism was expected to work quite independently of opinions or prejudices or party affiliations of the tariff commissioners or of any other persons.¹⁶

There can be little doubt, however, that Presidents Harding and Coolidge took a different view.¹⁷ They considered the Commission to be an aid, and even, after a fashion, perhaps, a check upon presidential rate-fixing. But they felt that the final responsibility rested with them; and so, indeed, the statute may with reason be made to imply.

There remained a degree of uncertainty as to the status of the Commission. The feeling that the findings of the body were in a sense supposed to form the basis of presidential decision made the temptation great to "pack" the Commission.¹⁸ This could be justified on the theory that they were, after all, presidential agents. It proved important in view of the fact that the criterion for rate-changing which

¹⁶ Quoted in Hearings, Part I, pp. 31-32.

¹⁷ See Hearings, *passim*, and below, Part II of this essay.

¹⁸ See Hearings, Part I, pp. 32 ff.

Congress set up was found to be unsusceptible to automatic application: judgment was involved, and was necessarily colored by the prepossessions of the members.¹⁹ It became important, therefore, to have men with "sound" views on the Commission. President Coolidge clearly thought the members held office at his pleasure in the last resort.²⁰

The scheme of 1922 was thus inconsistent. It did not clearly provide either an independent rate-making body or a mere presidential tool for investigation. It attempted to give final responsibility to the President in one breath, and in the next to set up a supposedly impartial agency to conduct the investigations needed by him in applying the criterion of Congress. This inconsistency was due to the fallacious assumption that that criterion could be mechanically applied. Since it could not, it became a question whether, in case of differences of opinion, the Commission's prejudices or those of the President should prevail. This ambiguity led to undesirable consequences. If the Commission is the final authority, it should be put upon a definitely independent basis. If it is a mere tool of the President, a separate agency of this sort is not needed. It cannot successfully be both at the same time. If the body is to be retained at all, it should be made either a completely independent rate-fixing or a com-

¹⁹ Ibid.

²⁰ See the conversation between President Coolidge and Commissioner Lewis, which is quoted in Part II, below.

pletely independent investigatory agency, reporting data, in the latter case, directly to Congress.

It may be that by neither means can Congress take the tariff out of politics. But that will not invalidate our contention that, should Congress genuinely seek to try the experiment, it should be able to guarantee to members of a properly constituted tariff commission independence of tenure.

Business-Operating Boards. The functions of a body like the United States Shipping Board involve *inter alia* the efficient operation of a business, and the decision of certain questions of economic policy, such as the disposal to private interests of government ships.²¹ Both sorts of questions involve highly complicated economic problems. Even if the recent criticisms made against the Shipping Board by Comptroller General McCarl are justified,²² still it is to be doubted whether Congress or an executive department head could have handled the sale of government ships with better results. Whether the method of control over a governmentally operated business by a board is likely to be efficient, and whether the controlling agency, be it a board or a single officer, should be independent of the President, are questions of legislative policy. Congress ought to be able, by trial and error, to work out in its own discretion the methods to be employed in each

²¹ See "Merchant Marine Act, 1920" (41 Stat. at L. 988), and "Merchant Marine Act, 1928" (45 Stat. at L. 659).

²² See *Baltimore Sun*, October 4, 1929, p. 1, col. 1.

such case on its own merits. If independence of tenure is thought desirable, it should be permissible for Congress to adopt it. If it proves undesirable in some cases, not in others, Congress should be free to act accordingly. One chief advantage of the constitutional theory to be presented in Part III is that it leaves this trial and error method open to Congress, except with reference to strictly presidential agents, such as the Secretaries of State, of War, and of the Navy. For Congress to make business-operation agencies independent, it need only refrain from giving them functions which infringe upon presidential prerogatives under the Constitution, and from seeking itself to participate in the act of removing. The question of the Senate's consent to removals is merely a matter of checks and balances in control over administrative agencies. The Myers case finally settled this question in favor of the President.²³ The question of guaranteeing these establishments independence of all political control is quite a different one.

So far as the purpose of Congress in establishing the Shipping Board is concerned, the reader is referred to the next chapter, where there will be given a full statement by a member of that board of the intent of Congress as interpreted by him.

It is distinctly not our purpose to insist that any or all business-operation agencies should be made independent. On the one hand, there is the argument that efficiency can best be obtained by vesting

²³ See below, Part III, chap. V.

control in the President as general manager of the government considered as a business enterprise. On the other hand, it may plausibly be urged that the same result is more likely if the head of the particular operation is freed from presidential control, and hence from the spoils system and similar partisan influences. But the fact that the latter argument is plausible is enough to justify leaving the national legislature free to try it.²⁴

The Federal Farm Board. As an illustration of the growing importance of "government by commission," we may cite the recently created Farm Board.²⁵ In his message to Congress of April 16, 1929, in which he advocated this board as a major means of farm relief, President Hoover expressed admirably the purpose behind the creation of this additional governmental agency.²⁶ The President in effect sanctioned the establishment of such a special agency as a means of protecting the "interest" of this "new public"²⁷—those adversely affected by the consequences of the post-war agricultural depression—when he said:

I have long held that the multiplicity of causes of agricultural depression could only be met by the creation of a great

²⁴ Our argument here is, it should be noted, somewhat different from that given in connection with administrative tribunals and certain other agencies.

²⁵ 46 Stat. at L. Cited as "Agricultural Marketing Act," and passed June 15, 1929.

²⁶ See Hart, "The President and His Policies," in *American Year Book*, 1929, for a discussion of the "Hoover idea" in relation to government by commission.

²⁷ See above, chap. II.

instrumentality clothed with sufficient authority and resources to assist our farmers to meet these problems, each upon its own merits. The creation of such an agency would at once transfer the agricultural question from the field of politics into the realm of economics and would result in constructive action. The Administration is pledged to create an instrumentality that will investigate the causes, find sound remedies and have the authority and resources to apply those remedies.

It is especially to be noted that the above-quoted passage assumed that the Board is meant to act in the scientific spirit.

The functions of such a board were outlined in the message as follows:

The pledged purpose of such a Federal farm board is the reorganization of the marketing system on sounder and more stable and more economic lines. To do this the board will require funds to assist in creating and sustaining farmer-owned and farmer-controlled agencies for a variety of purposes, such as the acquisition of adequate warehousing and other facilities for marketing; adequate working capital to be advanced against commodities lodged for storage; necessary and prudent advances to corporations created and owned by farmers' marketing organizations for the purchase and orderly marketing of surpluses occasioned by climatic variations or by harvest congestion; to authorize the creation and support of clearing houses, especially for perishable products, through which, under producers' approval, cooperation can be established with distributors and processors to more orderly marketing of commodities and for the elimination of many wastes in distribution; and to provide for licensing of handlers of some perishable products so as to eliminate unfair practices. . . .

In addition to these special provisions in the direction of improved returns, the board should be organized to investigate

every field of economic betterment for the farmer so as to furnish guidance as to need in production, to devise methods for elimination of unprofitable marginal lands and their adaptation to other uses; to develop industrial by-products and to survey a score of other fields of helpfulness.

The President, furthermore, indicated the complexity of the farm problem, and the fact that it is really a great number of separate problems, when he said:

There being no disagreement as to the need of farm relief, the problem before us becomes one of method by which relief may be most successfully brought about. Because of the multitude of causes and because agriculture is not one industry but a score of industries, we are confronted not with a single problem alone but a great number of problems. Therefore there is no single plan or principle that can be generally applied.

It is the very complexity of course, that makes any simple formula inadequate. Legislation alone is inadequate, and trial and error through the agency of an administrative board is what the President expressly sanctioned:

Every effort of this character is an experiment, and we shall find from our experience the way to further advance. We must make a start. With the creation of a great instrumentality of this character, of a strength and importance equal to that of those which we have created for transportation and banking, we give immediate assurance of the determined purpose of the Government to meet the difficulties of which we are now aware, and to create an agency through which constructive action for the future will be assured.

In such a scheme, Congress performs its proper function in creating the board, authorizing it to act along certain generally defined and limited lines, and supplying it with adequate resources to effect the specified purposes. The President expressed the views of the dominant opinion of the moment, or what President Lowell terms the opinion of the "effective majority" ²⁸—which is not necessarily the "numerical majority"—when he stated that the functions of such a board should not extend to "the buying and selling and price fixing of products." This prevented the debenture plan from being incorporated in the creative act of legislation. To use the President's own words:

Certain safeguards must naturally surround these activities and the instrumentalities that are created. Certain vital principles must be adhered to in order that we may not undermine the freedom of our farmers and of our people as a whole by bureaucratic and governmental domination and interference. We must not undermine initiative. There should be no fee or tax imposed upon the farmer. No governmental agency should engage in the buying and selling and price fixing of products, for such courses can lead only to bureaucracy and domination. Government funds should not be loaned or facilities duplicated where other services of credit and facilities are available at reasonable rates. No activities should be set in motion that will result in increasing the surplus production, as such will defeat any plans of relief.

In this way Congress, while delegating broad discretion to the board, does not unconstitutionally de-

²⁸ *Public Opinion and Popular Government*, pp. 12-15.

volve upon it its own "legislative" function.²⁹ The limits within which the scientific method must operate are properly to be fixed by statute. We may or may not agree with the President in his statement of what those limits should be. But the scientific method assumes, at least tentatively, the ends or purposes which are to be sought.³⁰ While these purposes have no absolute validity, or finality, nevertheless we cannot proceed without some assumptions,³¹ and under our system these are provided, in a general way, at least, by legislation.

The question may well arise, in connection with this present problem, whether the Farm Board should not be guaranteed independence of tenure. The President expressly compared it with the Interstate Commerce Commission as well as the Federal Reserve Board. Its functions will, indeed, more nearly resemble those of the Tariff Commission on the investigatory side, and those of the Department of Commerce under Mr. Hoover on the side of cooperation with industry. If the scientific approach is to be injected into the activities of the Board, it should be free, within the scope of its delegated authority, from political or group pressure of any sort. Is this not one reason for setting up a special agency instead of delegating these functions to the Depart-

²⁹ Cf. Hart, *The Ordinance Making Powers of the President*, chap. VI.

³⁰ Cf. Hart, "A Volume Against the Pragmatists," book review in *Virginia Quarterly Review*, October, 1928.

³¹ See above, Introduction.

ment of Agriculture? And have we not postulated that independence of tenure is a prerequisite of independence of judgment?

Department Heads and the Norris Plan. So traditional is the idea that the heads of the ten executive departments, as members of the cabinet or "official family" of the President, are directly subject to his administrative control, and ultimately subject to his arbitrary power of removal, that the suggestion that some of them may be made independent of the Chief Magistrate may appear at first blush both radical and unconstitutional. It may be radical; but we shall attempt to argue in Part III that it need not be held unconstitutional.

We are here concerned solely with the question of expediency. We need not consider the three department heads mentioned above³² as so peculiarly presidential tools that Congress may not constitutionally make them independent. This leaves us seven³³ whose tenure is open for discussion.

As in the case of the Shipping Board, we shall not make the claims for independence which we made with reference to regulatory boards and such investigatory boards as are created for the purpose

³² See above, this chapter, section on "Presidential Agents." See also Part III, below.

³³ That is, the Department of the Treasury, the Post-Office Department, the Department of the Interior, the Department of Justice, the Department of Agriculture, the Department of Commerce, and the Department of Labor.

of getting at the facts in a non-partisan spirit. We shall merely show, upon the basis of functions, that a case may be made out for the independence of these seven department heads. If one of them is entrusted with a function over which the President has, directly under the Constitution, exclusive control, then, of course, only two alternatives are left to Congress. Either it must refrain from regulating the tenure of the department head, or it must transfer this particular function to some other officer who is directly responsible to the Chief Executive. Otherwise, Congress should have the power to make any or all of them independent.

This is no mere academic question. Recently Senator George W. Norris, of Nebraska, chairman of the Judiciary Committee of the Senate, made a proposal along these very lines.³⁴ Senator Norris is noted for holding ideas in advance of public opinion. But he has a genius for hammering away at a plan regardless of its immediate popularity; and he often secures in the long run a considerable amount of support.³⁵ We shall no doubt hear from him on this subject in the future.

As quoted in the Baltimore *Evening Sun*, Senator Norris said:

I would like to see the Postmaster-General appointed, say, for ten years. This period might be lengthened or shortened,

³⁴ Baltimore *Evening Sun*, March 13, 1929, p. 1.

³⁵ Consider, for example, his proposals for a constitutional amendment eliminating "lame duck" congressmen, and his proposal for a governmentally operated plant at Muscle Shoals.

but the essential thing would be to prevent his term from running concurrently with the term of the President who appointed him.

The Postmaster-Generalship, particularly, is one of the posts whose policies should not be affected by changes of the Administration. The Postmaster-General's duties are entirely fixed by law, and Congress controls those duties. There is no reason why he should be changed every time a new President comes into office, and many reasons why he should not be.

The account in the *Evening Sun* continued:

If such a change were made, Senator Norris explained, it would also clear the way for having postmasters appointed by the head of the department, instead of by the President with Senatorial approval. This would have a double advantage, Senator Norris held: first, in promoting efficiency and the retention of efficient postmasters, and, second, in saving the time of the Senate and of individual Senators and Congressmen who are appealed to to support candidates.

OTHER LONG TERMS PROPOSED

There is no practical reason why the Senate should be called on to pass on thousands of postmasters each year, the Nebraskan stated. Of course, at present there are many political reasons for this.

The plan of long-term appointments might well also be extended to the Attorney-Generalship, and possibly the Interior and Commerce Department posts, Senator Norris said. The positions of the Secretaries of State, War and the Navy, he feels are in a different category because each carries out phases of foreign policy and national defense charged to the President as his prime responsibilities.

Senator Norris said he contemplates introducing a bill to these ends in the next Congress. He realizes that it would have little chance of prompt action, but thinks that a discussion

of it over a period of a few years would be educational, and would stimulate public interest in demanding the change in the future.

Particularly noteworthy is the fact that Senator Norris classified the department heads in the manner suggested above. That is, he distinguished from the others the Secretaries of State, of War, and of the Navy as being peculiarly presidential agents. He did not mention three departments, but presumably would put them in the same category as the Post-Office Department.

The result of his plan, especially if it were accompanied by independence of tenure, would be to substitute a permanent, independent secretary for the present political chief. The British system provides for a permanent undersecretary as the capstone of the permanent staff; but it has a political secretary and a political or parliamentary undersecretary above him.⁸⁶ At present, we have a political head, political assistant secretaries, often more or less political bureau chiefs, no officer corresponding to the British permanent undersecretary, and, in the Post-Office Department, numerous political appointees as local postmasters.⁸⁷ The British organization is

⁸⁶ See Ogg, *Government and Politics of England*, and Finer, *The British Civil Service*. Cf. Lowden, "Permanent Officials in the National Administration of the United States," in *American Political Science Review*, August, 1927.

⁸⁷ However, see Macmahon, "Bureau Chiefs in the National Administration of the United States," in *American Political Science Review*, August and November, 1926.

superior to ours; but the Norris plan would go even a step further. With the growing tendency to emphasize the scientific, judicial and "business" aspects of public administration, we may in the future desire to eliminate the politician at the top. Already it is considered essential that the President head certain departments with men of expert ability in their respective lines; and Presidents who fail to do so are severely criticized.

The Post-Office Department is a business-operation department, comparable in many ways to the Shipping Board. It is even more clearly a service-rendering agency; and in connection with exclusion from the mails it has regulatory functions closely connected with freedom of expression. There might well be opposition to entrusting such a vital service to a completely independent bureaucracy. Its regulatory functions are, furthermore, more intimately related to personal liberty than those of a body which regulates public utilities. Perhaps an adequate merit system on the English model, which would retain at the very top a politically responsible chief, but would have the rest of the staff permanent, is to be preferred to the Norris plan. But if the country desires to experiment with his plan, it should be legally possible for Congress to adopt it.

It is unnecessary to consider each of these seven departments in detail. If Congress desired to make them independent, it might find it necessary to transfer some of their functions to presidentially con-

trolled departments. On the other hand, it might see fit to transfer, say, certain engineering functions of the War Department, on their technical side, to an independent department. This will depend upon future court decisions as to the exact boundary-line between functions which may and those which may not be freed from presidential supervision, as well, of course, as upon current opinion as to the most expedient allocation of functions.

The Interior Department is concerned with the administration of the public domain, as well as with questions like irrigation, reclamation, pensions, etc. The objections listed above against an independent Post-Office Department scarcely apply. The Interior Department is one which might with least objection be made an independent establishment.

The same is true of the Department of Agriculture. That organization is concerned primarily with technical research, and with the rendering of services which do not involve fundamental problems like those raised by the manner in which the postal service is conducted. Its non-partisan character is even now respected.³⁸ It should be relatively easy to make its head a permanent, independent official.

In legislating on such matters, Congress cannot, of course, move faster than effective public opinion is ready to go. It would have also, if it acted wisely, to look at the problem as a whole as well as at its separate phases. Thus, if there were too many such

³⁸ Ibid.

independent establishments, it might be impossible to tell how they were functioning. Extreme decentralization would probably bring its own train of evils.³⁹ To repeat what has been said above, our main thesis in this connection is that the Norris plan ought to be a *possible* governmental arrangement.

Independence of Tenure and the Function of the President as General Manager. Mr. W. F. Willoughby, a leading student of public administration, has emphasized the position of the President as general manager of the government considered as a business corporation.⁴⁰ What is the relation of his thesis to ours?

In this connection we must take note of Mr. Willoughby's important distinction between what he calls the institutional activities of administrative services and those which he terms functional. It is primarily for the former that he desires control by the President. He says:

Analysis of the duties or working activities of an administrative service shows that they fall into two clearly distinguishable classes: those which the service has to perform in order that it may exist and operate as an organization or institution, and those that it must perform in order to accomplish the ends for which it has been established and is being maintained.

³⁹ This extreme decentralization worked badly in the several state administrations, and led to the movement for state administrative reorganization. But the safeguards of independence of judgment were lacking: independence of tenure, tradition of selecting expert heads, etc.

⁴⁰ See his *Principles of Public Administration* (Johns Hopkins Press, 1929), chaps. III and IV.

These two activities may be distinguished as institutional and functional. The institutional activities embrace such work as maintenance, care, and operation of plant, the recruitment and management of personnel, the purchase, custody, and disbursement of moneys, the keeping of accounts and the preparation and rendition of reports, the handling of correspondence and files, and other like matters. . . .

. . . . Functional activities are special and technical, and are different for each kind of service. Institutional activities, on the other hand, are similar if not identical in character for all services it is desirable that the methods of performing these activities should be made uniform or standardized throughout the government services as far as circumstances will permit. . . . If this important phase of public administration is to be properly handled, it becomes the duty of the chief executive, in his capacity as general manager, to take the action required to insure that this class of activities is being properly performed. . . . ⁴¹

To this end Mr. Willoughby has proposed that there be attached to the office of the Chief Executive a bureau of general administration to aid him as the general manager in his supervision of the institutional activities of the several services. To quote again his own words:

Representing as it does the agency through which the chief executive is to perform his duties as general manager, it would seem to be evident that this bureau of general administration should be independent of all other administrative agencies and attached directly to the office of chief executive. . . .

All grant of powers in respect to the control of the administrative service should be made to the chief executive. The bureau should be merely the executing agency of the chief

⁴¹ Ibid., pp. 45-46.

executive, the organ through which the latter exercises these powers. . . .

Its functions should be solely those of keeping in touch with the operating services, of securing the information needed by the chief executive in order to insure that such services are properly conducting their affairs, and of formulating and enforcing on behalf of the chief executive general rules and regulations requiring uniform or standard methods of procedure in so far as such uniformity of procedure is desirable. . . .

It is quite possible, however, to make use of this agency for the performance of functions of control that are of a more affirmative character. . . . There has been a strong movement in recent years to vest in some central agency the control, if not the execution, of the more important activities of the first [institutional] class. This has found expression in the establishment of central accounting offices, central purchasing agencies and the like. . . . To the extent to which this policy is adopted it would seem logical that the actual exercise of this control or performance of institutional activities should be entrusted to the bureau of general administration or to special agencies that should be subordinate divisions of that bureau. The writer has, thus, recommended that in the case of the national government, the control now exercised by the Public Buildings Commission over the allotment of quarters to the administrative services and by the Joint Committee on Printing over publications to be issued by the services be transferred to the Bureau of the Budget, and that the General Supply Committee, now a subordinate service of the Treasury Department, be made a subordinate service of that bureau. The adoption of this principle would seem to carry with it the desirability of making the central personnel agency, the Civil Service Commission, likewise a subordinate agency of the bureau of general administration. There are, however, special reasons in this case which make it advisable that this should not be done.⁴²

⁴² Ibid., pp. 54-57.

With this expert opinion thus in mind, we are now prepared to outline our answer to the question asked at the beginning of this section:

First: Certain powers of the President as general manager may be exercised without in any way conflicting with the independence of tenure of administrative agencies. These powers relate to the formulation of policies of the President which he submits to Congress for enactment into law. These policies may, indeed, properly relate to the functional as well as the institutional activities of the services. In this connection the chief presidential power is that of budget-making. This is necessarily a work program as well as a financial program.⁴³ The funds granted a given department determine in large measure its functional activities. But there can be no objection to having the President explicitly recommend, as the Constitution authorizes him to recommend,⁴⁴ measures which will define the functional activities of any administrative service. The recommendatory powers of the President are in no way inconsistent with the independence of tenure of interstate commerce commissioners. They are distinct from administrative supervision.

Secondly: The functional activities of administrative tribunals, of special investigatory bodies like the Tariff Commission, and of certain other agencies like the General Accounting Office, should, and those

⁴³ Willoughby, W. F., *The National Budget System*, passim.

⁴⁴ Article II, sec. 3.

of some other agencies may, be made completely independent of the President. To this end independent tenure of their heads is desirable. It is the importance of this that the opinion of the Chief Justice in the Myers case completely fails to consider.⁴⁵

Thirdly: In the work of administrative tribunals and certain other agencies, the functional activities are of predominant importance, and are distinct, in general, from the institutional features of the respective organs. The latter can for the most part be sufficiently controlled by statute, with the President coming into the picture mainly in order to recommend legislative stipulation. If it proves expedient to allow the President a degree of institutional control over these agencies in the interest of economy and efficiency, it would seem that this might be maintained through the statutory requirement that an independent board purchase supplies through a central agency, that it take quarters allotted to it by a bureau of general administration, that it keep accounts as prescribed by presidential rules and regulations, and that it conform in certain other ways with the regulations which the general manager may make relative to uniform institutional activities of all administrative agencies.⁴⁶ Enforcement of these requirements could in large part be effected by requiring the Comptroller General to refuse to sign warrants for appropriations unless the requirements were con-

⁴⁵ See this chapter and Chap. II above.

⁴⁶ Cf. the quotation from Mr. Willoughby given above.

formed with. The President need not have power to remove.

Fourthly: In the work of certain administrative agencies, such as the Post-Office Department, the institutional side is especially important, and is inextricably interwoven with the functional side. Efficient administration and effective performance of function are not separable. This suggests the need for a more detailed, more direct, and more directly enforceable supervision of the administrative or institutional activities of the whole classified service than in the case of administrative tribunals. Hence the question of making independent those agencies whose function is to operate a business is conditioned upon whether it is decided that this direct supervision is to be entrusted to the President or to an expert and irremovable department head. In the latter case only will there be a possible departure from the spirit of Mr. Willoughby's conclusions.⁴⁷ And even then, the rules and regulations which the last paragraph held to be consistent with independence of tenure could be made to apply.

Fifthly: With reference to agencies whose functional activities are, as a matter of policy, subjected to presidential supervision, there is no question but what their institutional activities ought also to be under his control. This control of both sorts of

⁴⁷ The choice here suggested is not one upon which we intend to be dogmatic. Our sole purpose is to insist that Congress should be able to choose either method as occasion demands.

activity will be his in connection with those departments whose principal officers must, under the Constitution, be removable by him, as well as with those whose functional activities Congress is not yet prepared to try to remove from the "political" arena.

Sixthly: It is to be noted that Mr. Willoughby does not advocate, but rather opposes, making the Civil Service Commission a subordinate branch of his proposed bureau of general administration.⁴⁸ That Commission ought clearly to be independent of the Executive, for the reason that its very purpose is to seek to place the appointment and tenure of classified officers upon a basis of merit, rather than of partisan politics through presidential appointments and removals under the "spoils system."

The Civil Service. We may safely assume that it is desirable to have the staff members of every administrative service in the government completely under the merit system in regard to appointment, discipline, promotion, demotion, suspension and removal.⁴⁹ Our present concern is with removal.

Under the theory of removal set forth in the Myers opinion, as Dr. Albert Langeluttig has pointed out,⁵⁰ Congress may give the members of the classi-

⁴⁸ See the quotation from this author, given above, as well as the part of his *Principles of Public Administration* which deals with personnel problems.

⁴⁹ This is so generally accepted by students of public administration that it is here merely assumed, at least as a working hypothesis.

⁵⁰ Cf. his article on "The Legal Status of the Comptroller-General of the United States," in *Illinois Law Review*, XXIII, 556, at pp. 580, 590.

fied services independence of tenure by vesting their appointment in the heads of departments or in the courts.⁵¹ For all such officers are "inferior"; and if Congress vests the appointment of inferior officers in the heads of departments, it may regulate their removal. Dr. Corwin holds otherwise. He insists that the "logic" of the Myers opinion would still leave an additional power of removal in the President as "the Executive."⁵² But this seems neither to be what the Chief Justice said in his opinion, nor a necessary conclusion from his premises. For the Chief Justice found the President vested with "the executive power" except as otherwise inferrible from the text; and, from the power of Congress to vest the appointment of inferior officers elsewhere than in the President, he inferred a power to regulate their tenure.

However, the Myers opinion maintained that Congress secures this power only if and when it actually vests the appointment of such inferior officers in the department heads. The fact that Congress may so do gives it no power over removals so long as it leaves the appointment in the President and Senate,

⁵¹ The main officers now appointed by the courts of law are attachés of the courts. It would not be advisable to burden the courts with the problem of resisting pressure for political appointments, unless constitutional *mores* in this respect should curb this pressure. Furthermore, would it be proper to have the Supreme Court appoint the members of the Interstate Commerce Commission—a body that in many respects resembles a "trial court" and from which cases are appealed to the Supreme Court?

⁵² See his *President's Removal Power*, p. 7.

or even, so the Chief Justice hinted, if it vests the appointment in the President alone.

The problem of the civil service and the freedom from the spoils system of its members is thus, under the Myers opinion,⁵³ given a satisfactory solution, except for cases where Congress might not desire to take appointment from the President, but might still desire to restrict removals. Thus, let us suppose Congress desired to adopt the British system, whereby, leaving out of account the one or two "amateurs" at the top, the permanent staff is a completely organized hierarchical unit, professionalized from the mere clerks to the permanent undersecretary.⁵⁴ The legislature might decide to leave the appointment of the permanent undersecretary to the President and Senate, or vest it in the President alone. Under the Myers opinion, Congress could not in the former case, nor probably in the latter, regulate the power of removal.

However, it would probably inject into the selection partisan and local politics if the Senate were allowed a voice in the appointment of a permanent undersecretary. The desirable choice would probably be between appointment by the President alone

⁵³ In Part III, the Myers *opinion* will be summarized in detail, and an attempt made to show that its premises are broader than was required by the facts of the case in hand. Hence, under a strict application of the doctrine of *stare decisis*, the *opinion* is in large part *dicta*, and will, for that reason, be distinguished from the *decision* in the case. Whenever we shall refer to the Myers *opinion*, this distinction should be kept in mind by the reader.

⁵⁴ See reference in note 36 above.

and appointment by the "political" officer at the top of the hierarchy. The latter presumably being responsible to the President, there is little difference between the two methods as such. This being so, the fact that Congress might not be able to restrict the President's power to remove officers appointed by him alone would not matter much, if any. For it could obtain power to control removal simply by vesting appointment in the department head alone.

The fact that in such cases Congress might so easily avoid the consequences of the reasoning emphasized in the Myers opinion is probably what led Professor Corwin to say that the "logic" of the case allowed the President to step in and remove appointees of department heads regardless of congressional restrictions upon removals by such heads themselves. But one solution is, in practice, as absurd as the other. The Court claimed that Congress could get control over tenure merely by the expedient of vesting appointment in the President's "alter ego." Professor Corwin seems to claim that the President can nullify the congressional control thus established by himself removing for political purposes.

But accepting for the moment the conclusions of the Myers opinion—that is, what the Court said—we see that it does not really prevent Congress from freeing the permanent staff of a department from the spoils system, so far, at least, as removals

are concerned. It leaves a satisfactory loophole whereby Congress can restrict the removal of such officers for political purposes.

Our objection to the Myers reasoning, on grounds of expediency, rests upon other consequences, outlined above or to be outlined in succeeding paragraphs. Thus, for example, if Congress desired in some departments to abolish the political chief, and have at the top a permanent secretary, difficulties would ensue. For there would be no departmental superior in whom appointment of the latter could be vested. And Congress could not vest the appointment of permanent heads of this sort in the courts. If it could do so, this would be a method of very dubious expediency.⁵⁵ Hence under the Myers opinion, Congress could not in such cases control removals, unless the Court acceded to the conclusion that, by removing the Senate's check upon removals of the President—that is, by increasing his power over appointments—Congress could decrease his power over removals! If the Court is to take this position, why could it not take the more tenable position that, by giving Congress control over the appointment of all inferior officers, the Constitution gives it control over their removal even where Congress does not actually take their appointment from the President? The Myers opinion arbitrarily rejects this position.

⁵⁵ For the reason that it might tend to draw the judiciary into politics. No chances should be taken along this line.

It is something, indeed, to have the broad deductions of the Court leave a loophole for the control of removal of the rank and file of the civil service. Yet the opinion in this case is so inexpedient on other important counts as to justify its repudiation.

Administrative and Territorial "Courts." Another problem of tenure may be illustrated by reference to the recent case of *ex parte Bakelite Corporation*.⁵⁶

The Bakelite Corporation had filed with the Tariff Commission a sworn complaint charging against certain parties unfair methods and acts in the importation and subsequent sale of certain articles, and alleging a resulting injury to its domestic business of manufacturing and selling similar articles. The Tariff Commission had entertained the complaint under sec. 316 of the Tariff Act of 1922;⁵⁷ had made findings sustaining the charges; and had recommended that the articles to which the unfair practices related be excluded from entry. Whereupon, the importers had, under the same section, appealed to the Court of Customs Appeals. The Bakelite Corporation had challenged the latter Court's jurisdiction on constitutional grounds; but the Court had upheld its jurisdiction and announced its purpose to entertain the appeal. Thereupon, the Bakelite Corporation had presented to the Supreme Court its petition for a writ of prohibition to the

⁵⁶ 279 U. S. 438.

⁵⁷ 42 Stat. at L. 858.

Court of Customs Appeals. The grounds of the petition, as stated by the Supreme Court were:

1. That the court of customs appeals is an inferior court created by Congress under § 1 of article 3 of the Constitution, and as such it can have no jurisdiction of any proceeding which is not a case or controversy within the meaning of § 2 of the same article.

2. That the proceeding presented by the appeal from the Tariff Commission is not a case or controversy in the sense of that section, but is merely an advisory proceeding in aid of executive action.

In denying the petition for the writ, Mr. Justice Van Devanter, speaking for the whole Court, declared that the Court of Customs Appeals was not a "constitutional" court which could only decide a "case" or "controversy." He held it to be a "legislative" court, that is, one established not under Article III, Section 1, of the Constitution, but under other powers of Congress. Its jurisdiction, therefore, was not confined to the classes of "cases" and "controversies," involving final judgments, listed in Article III. It might be, and had been given authority to issue "advisory" as well as "binding" judgments—to determine matters which might be and at times had been left to executive officers. In this way the court upset the contention of the Bakelite Corporation that the Court of Customs Appeals is a constitutional court which could not be given the jurisdiction it had claimed under the statute.

Among the existing "courts" which are thus "legislative" courts and are not created under Article III, the Court listed:

1. Territorial courts.
2. The courts of the District of Columbia.
3. The United States Court for China.
4. Consular courts.
5. The Court of Claims.
6. The Court of Private Land Claims.
7. The Choctaw and Chickasaw Citizenship Court.
8. The Customs Court.
9. The Court of Customs Appeal.⁵⁸

Senator Norris' recently proposed "United States court of administrative justice" would doubtless come in the same category.⁵⁹

⁵⁸ See Willoughby on the Constitution (2d ed., 1929), II, § 801. Cf. Brown, George Stewart, "Judicial Review in Customs Taxation," in *Forum*, July, 1918.

⁵⁹ See Congressional Record, 70th Cong., 2d sess., vol. 70, pt. I, pp. 1030-1033. In introducing a bill to create "the United States court of administrative justice," Senator Norris said: "The proposal which I have brought forward in the bill is to create a United States court of administrative justice and to transfer to that court the five judges of the Court of Claims and the five judges of the Court of Customs Appeals. The bill proposes to give this Government court exclusive jurisdiction over all suits against the United States, together with the jurisdiction now exercised by the Supreme Court of the District of Columbia to grant writs of mandamus and bills of injunction against officers and employees of the United States. . . . The bill proposes to abolish the procedure of suits against collectors of internal revenue." He proposed that the court should sit in divisions of 3, except in matters of rehearing, when 9 must sit. Divisions are to hold sessions in any part of the country where business demands. "The bill adds nothing to nor does it subtract from the substantive law of claims against the United

With reference to claims, the opinion in the *Bakelite* case declared that Congress may determine these itself, or delegate authority to do so to executive officers or to a "legislative" court.

With reference to the status of a given court as "constitutional" or "legislative," the opinion further said that this is not determined by the intent of Congress freely exercised, but "the true test lies in the power under which the court was created and in the jurisdiction conferred."

With reference to the tenure of judges of "legislative courts," the opinion said:

A feature much stressed is the absence of any provision respecting the tenure of the judges. . . .⁶⁰ Nor has there been any settled practice on the part of Congress which gives special significance to the absence or presence of a provision respecting the tenure of judges. This may be illustrated by two citations. The same Congress that created the Court of Customs Appeals made provision for five additional circuit judges and declared that they should hold their offices during good behavior, and yet the status of the judges was the same as it would have been had that declaration been omitted. In creating courts of some of the territories Congress failed to

States." The court would thus have, *inter alia*, jurisdiction now possessed by the Court of Claims, the Court of Customs Appeals, the Board of Tax Appeals, and the United States district courts in so far as suits against the United States are concerned. There are other interesting points in the plan and in Senator Norris' argument in favor thereof.

⁶⁰ The Court then proceeded to say that the factor that distinguishes "legislative" from "constitutional" courts is not the intent of Congress that a given court shall be one or the other, as indicated by statutory references to tenure, but the nature of the jurisdiction conferred and the power under which such jurisdiction was conferred.

include a provision fixing the tenure of the judges; but the courts became legislative courts just as if such a provision had been included.

The point with which we are here concerned is whether—since the judges of “legislative courts” do not hold office during good behavior as of constitutional right^{60a}—they hold office subject to the arbitrary and illimitable power of removal of “executive” officers which the Myers opinion seeks to give the President; or whether their tenure is subject to congressional control; and, if the latter, whether their tenure in the absence of statutory provision is during good behavior or at the pleasure of the President.

At the outset, it is worth while to point out that tenure “during good behavior” is not defined in the Constitution, and has never been defined by the Supreme Court. Professor W. W. Willoughby says:

Although it has been true that Federal judges have been held removable only by impeachment, the Constitution does not say that this is the only way in which they may constitutionally be removed. The only express provision is that they shall hold office during good behavior, and this is provided for with regard to the members of the Customs Court.⁶¹

Thus if it should have been held that these judges hold during good behavior as of constitutional right,

^{60a} See *American Insurance Co. v. Canter* (1 Peters 511); *McAllister v. United States* (141 U. S. 188); *Wingard v. United States* (141 U. S. 201). Presumably, the *dicta* of these cases, together with early practice, establish the point. The opinion in the *Canter* case was written by Chief Justice Marshall in 1828.

⁶¹ Willoughby, *op. cit.*, II, 1261.

then the question might have arisen whether the act of Congress relative to the United States Customs Court is valid. This act⁶² provides a court of nine members appointed by President and Senate, and holding office during good behavior, but removable, after due hearing, by the President for neglect of duty, malfeasance in office, or inefficiency. Is this all that is required by tenure "during good behavior" as that term is used in Article III? All we need say here is that it is generally assumed, and is certainly to be hoped, that it is not.

But since such "courts" are not created under Article III, it was early conceded that their judges have no constitutional claim to tenure during good behavior, however that term be defined.

At once, however, the validity of the above-mentioned statute is called into question from another angle. Are these courts "legislative" in the sense merely that they are created by the national legislature under its own powers, and not to exercise the jurisdiction described in Article III; but "executive" in the sense that they come within the claim of the Myers opinion that the President has an illimitable power to remove at pleasure all "executive" officers appointed by him with the Senate's consent? Or are they also "legislative" in some sense which makes it possible for Congress to regulate the tenure of their judges.

⁶² 42 Stat. at L. 858, at p. 972.

In the latter event, it is probable that the President may remove these "judges" at pleasure, in the absence of congressional provision.⁶³

Since they are not by the Constitution guaranteed tenure during good behavior, the question whether Congress may prescribe their tenure turns out to be whether Congress may guarantee them independence of tenure, or whether they are necessarily subject to an arbitrary removal power.

The inadvisability of giving members of courts handling claims and tax questions this dependent status would seem to need no argument. The matter of claims is, to be sure, tied up with the whole doctrine of the suability of the state only with its own consent.⁶⁴ But that doctrine is now admittedly barbaric.

We need only turn to the French *droit administratif*, which gives the citizen adequate remedies against his government in a court which in practice is independent in its tenure,⁶⁵ to see how barbaric our theory is. So long as the citizen is unable to sue his government without its legislature's consent, that legislature should at least be able to establish for such suits a court as independent as the

⁶³ This is universally admitted to be the method of removal which applies to "executive" officers in the absence of congressional provision. See Part III, below.

⁶⁴ See, for example, Watkins, *The State as a Party Litigant* (Johns Hopkins University Press, 1927).

⁶⁵ Cf. Garner, "French Administrative Law," in *Yale Law Journal*, April, 1924; and Duguit, "The French Administrative Courts," in *Political Science Quarterly*, September, 1914.

French *Conseil d'Etat*.⁶⁶ This part of our argument refers to courts like the Court of Claims, the Court of Private Land Claims, the Customs Court, the Court of Customs Appeals, and Senator Norris' proposed consolidated administrative court.

There are others of these "legislative" courts which fall in a different category, but one which implies even more clearly independence of tenure. The courts of the territories and of the District of Columbia, as well as the consular courts and the United States Court for China, all of them hear causes to which private citizens are the parties plaintiff and defendant. The political principle is here the same as it is for the courts established under Article III. And that principle is in no wise weakened by the drawing of constitutional distinctions.

To support our claim with reference to both types of "legislative" courts, we need only quote Dr. Frank J. Goodnow:

One of the fundamental principles of constitutional government, as seen in the law of modern European states, is:

First. The existence of judicial bodies independent in tenure of the executive; which shall,

Second. Apply the law regulating the relations of individuals with one another—usually called the private law—by deciding cases brought before them; and,

Third. Shall apply in the same manner the law regulating the relations between officers of the government and private individuals—usually called public or administrative law.

⁶⁶ Sait, *Government and Politics of France*, p. 388. This independence is based upon constitutional *mores*. See Part II, below.

Whether a formal distinction is made between the private and the administrative law, and whether these two functions are discharged by the same courts, are matters of comparatively little importance. The important thing is that the courts which have these powers shall be independent of the executive. Without such independence it may be said that constitutional government is impossible.⁸⁷

The Myers opinion might be held not to apply to territorial and consular courts, on the theory that Congress has complete control over the governmental organization of territories.⁸⁸ In prescribing such organization, it is not bound by the maxim *delegata potestas non postest delegari*.⁸⁹ Perhaps it is not bound to place the appointment of territorial officials in the President. Perhaps also it can regulate tenure in the territories.

The status of judges of courts dealing with contractual and tax claims against the government seems more doubtful. If we are here dealing with "executive" officers, then the Myers doctrine would seem to place their tenure at the mercy of an illimitable presidential power of removal. The President could not "properly" dictate or revise their de-

⁸⁷ *Principles of Constitutional Government*, pp. 243-244. Quoted in Brown, George Stewart, article cited above in note 58.

⁸⁸ See Willoughby on the Constitution (2d ed., 1929), I, 446-447. Cf. pp. 502-506.

⁸⁹ In *United States v. Heinszen* (206 U. S. 370), the Court said that Congress, in dealing with the Philippine Islands, may delegate legislative authority to such agencies as it may select. See Hart, *Ordinance Making Powers of the President*, p. 128, note 34.

cisions, but he could remove them for having rendered a decision of which he disapproved.⁷⁰

This result could be evaded, if such "judges" were held to be "inferior" officers, and if Congress were willing to vest their appointment in heads of departments or those courts of law established under Article III. The question whether Congress could gain control of tenure by vesting the appointment of inferior officers in the President alone was left in doubt by the opinion in the Myers case. It might be quite appropriate for Congress to vest this sort of appointments in the Supreme Court,⁷¹ and then it could guarantee permanence of tenure.

Our discussion has involved several if's. The future status of these courts depends upon future decisions. The Supreme Court might place them in a special category, as some writers have urged it should place the General Accounting Office.⁷² But the reasoning by which it would have to do this could probably be extended to include administrative tribunals like the Interstate Commerce Commission.⁷³ Such an extension of this reasoning would really be a repudiation of the broad premises of the Myers opinion. It would narrow the scope

⁷⁰ That is, according to the *opinion* in the Myers case. See below, chaps. V and VII.

⁷¹ As Dr. Albert Langeluttig suggests in connection with the Comptroller General. See his article cited above in note 50.

⁷² See section below, this chapter, on "The General Accounting Office."

⁷³ It might be held that Congress may, under its financial powers, set up an independent agency to secure their effective execution. But it might also be held that Congress may, under its postal power

of the Myers decision to the point where it would approximate the theory of the removal power to be set forth in Part III.

At any rate, it is highly desirable that all "legislative" courts be made independent of the executive. And in Part III we shall develop a theory of removals which will allow Congress to protect them, as well as other organs of government, in such independence.

The General Accounting Office. It is an accepted principle of public administration that the auditing of accounts should be placed in an organ which is independent of the executive.⁷⁴ Since the function of the General Accounting Office, as established by the Budget and Accounting Act of 1921,⁷⁵ is to act as a check upon the spending departments, it is clear that the purpose of the office can be effectively realized only if the Comptroller General and the Assistant Comptroller General who head it may be made independent of these departments and of the President who controls them. The Office is an agency of Congress to see that appropriations are spent in accordance with the law, and to suggest means of improving the efficiency with which the money voted by Congress is spent. It is meant

or its commerce power, set up independent agencies to execute them. It is a question of the relative weight given to these several possible inferences. We shall in Part III give full weight to all of them in terms of a *general principle*.

⁷⁴ This is so generally accepted by students of public administration that it is here taken as a working hypothesis.

⁷⁵ 42 Stat. at L. 20.

to be a watch-dog of the treasury set up by Congress as a check upon the executive. Mr. W. F. Willoughby, Director of the Institute for Government Research, and a leading authority on public administration, says:

Undoubtedly the most important feature of this act was, not the consolidation of the powers and duties of the seven officers that have been mentioned ⁷⁶ in a single Comptroller General of the United States, or the enlargement of the functions of that officer, but the provision that the service to be directed by him, the General Accounting Office, should be independent of the executive departments and directly responsible to Congress for the manner in which it performed its duties. This provision represents a revolution in respect to the system that had theretofore prevailed since the organization of the government for the settlement and adjusting of the financial accounts of the government.⁷⁷

And again he writes:

In our consideration of the legal status of the General Accounting Office it has been pointed out that the prime purpose of Congress in creating this office was to strengthen congressional control over the administration in respect to the collection and disbursement of funds. . . .⁷⁸

In another place he declares:

The function of supervision and control is, thus, one belonging to the legislative branch. . . .⁷⁹

⁷⁶ That is, the former Comptroller of the Treasury and the six Auditors for the departments.

⁷⁷ *The Legal Status and Functions of the General Accounting Office of the National Government* (The Johns Hopkins Press, 1927), p. 1.

⁷⁸ *Ibid.*, p. 17.

⁷⁹ *Principles of Public Administration*, p. 434.

Just as the chief executive has need of a bureau of general administration through which he can perform his duties of general manager, so the legislature has need of a similar agency through which it can meet its administrative responsibilities. The office of auditor provides such an agency. That it may perform this function, is one of the strongest reasons why it should be attached to the legislative branch, or be at least completely independent of the executive. . . .⁸⁰

In creating the independent General Accounting Office, Congress entrusted to it, not only all the powers formerly possessed by the Comptroller of the Treasury and the six auditors for the departments, but also conferred upon it broad powers and duties of acting as the agency to enquire into the manner in which the administrative services were conducting their affairs and of recommending action that should be taken to improve administrative conditions.⁸¹

Congress sought, in the Budget and Accounting Act, to give this desirable independence of tenure by the following provisions:

Sec. 303. Except as hereinafter provided in this section, the Comptroller General and the Assistant Comptroller General shall hold office for fifteen years. The Comptroller General shall not be eligible for reappointment. The Comptroller General or the Assistant Comptroller General may be removed at any time by joint resolution of Congress after notice and hearing, when, in the judgment of Congress, the Comptroller General or Assistant Comptroller General has become permanently incapacitated or has been inefficient, or guilty of neglect of duty, or of malfeasance in office, or of any felony or conduct involving moral turpitude, and for no

⁸⁰ Ibid., p. 647.

⁸¹ Ibid.

other cause and in no other manner except by impeachment. . . .⁸²

However interpreted, the Myers decision probably renders this provision for removal by Congress unconstitutional, unless the Supreme Court sees fit to make a special exception of this agency.⁸³

That it should do so has been urged by Mr. W. F. Willoughby.⁸⁴ His argument is that the General Accounting Office is peculiarly a "legislative" agency, not an "executive" agency. In justification of this argument, he cites the constitutional powers of Congress relating to finance which may be interpreted to authorize Congress to set up such an agency of its own to see that its financial enactments are properly executed.

In Part III we shall show that there are many other administrative agencies which, while "executive" in the sense that they perform "executive" functions and may be supervised, therefore, if at all, only by executive officers, are agencies through which Congress seeks to make effective its legislative powers; and hence that Congress may regulate their tenure. It will, therefore, be unnecessary to determine whether the General Accounting Office is more "peculiarly" a "legislative" agency than they.⁸⁵ For acceptance of our theory will involve

⁸² 42 Stat. at L. 20.

⁸³ For explanation of this statement see below, Part III, chap. V on "The Myers Decision v. the Myers Opinion."

⁸⁴ Op. cit. in note 77, chap. I.

⁸⁵ Whether this view is taken depends upon the results of a process of "reflective thinking," in which different persons might give dif-

acceptance of the power of Congress, not to participate in the removal of any of them, but to govern by statute the conditions of tenure of all of them. On our theory, then, Congress, while it may not be able to take to itself the power to remove the Comptroller General, may nevertheless guarantee him tenure during good behavior.

Even under the Myers opinion, of course, Congress may regulate his tenure on two conditions: (1) that he be held to be an "inferior" officer; (2) that Congress be willing to vest his appointment in (say) the Supreme Court. Even if every officer who appoints other officers is "superior,"⁸⁶ then the Comptroller General could probably still be classed as an "inferior" officer, since he apparently appoints "employees" rather than "officers."⁸⁷ Under the theory of removals to the elaboration of which we shall now turn, all such doubts as this are brushed aside, and the way left open for the guarantee by Congress of independence of tenure to all officers of two sorts:

ferent weights to different factors. It should be stated that Mr. W. F. Willoughby recognizes that the same principle which he applies to the General Accounting Office may be applicable to other agencies.

⁸⁶ See below, this chapter, section on "Inferior and Superior Officers."

⁸⁷ See 42 Stat. at L. 20, at sec. 311. The Secretary of the Interstate Commerce Commission is apparently also an employee, since he is referred to in connection with other employees: 25 Stat. at L. 861. Apparently appointment by others than the President, the courts, or department heads (however defined) makes appointees "employees." See *United States v. Germaine* (99 U. S. 508).

(1) Those whom we have shown in this chapter and the last to require independence for the proper exercise of their functions. This category includes members of administrative tribunals, of certain types of investigatory commissions, the classified services of the several departments, the "judges" of administrative and territorial "courts," the Comptroller General, and the Assistant Comptroller General.

(2) Those for the independence of whom a plausible but less conclusive argument may be made on grounds of public policy, but whom Congress may make independent without infringing upon the special prerogatives of the President, and whom it should be able, in the exercise of its legislative discretion, to make independent of the President. These include bodies like the Shipping Board, and the heads of seven of the ten executive departments.

Inferior and Superior Officers. Under the Myers opinion, Congress may in no way restrain the arbitrary power of the President to remove at pleasure all superior officers. It may, however, by vesting the appointment of "inferior" officers in the department heads or courts, control by statute the conditions of their tenure. Under our theory, this distinction is irrelevant. But, if the Myers opinion becomes law, it will be necessary to draw the line between these two types of officers. In a *dictum*, the Court once said that superior officers are only those specially mentioned in the Constitu-

tion.⁸⁸ This includes ambassadors, other public ministers, consuls, judges of the Supreme Court, and heads of departments.⁸⁹ The latter are casually referred to in two clauses of the Constitution,⁹⁰ and may be further inferred to be superior from the fact that Congress may vest in them the appointment of "inferior" officers.⁹¹ However, the members of federal administrative boards who choose employees rather than officers⁹² do not on that account have to be construed as, collectively, "heads of departments" for the purposes of such appointing power.

If a realistic view be taken of the distinction, then certainly these boards are composed of superior officers; and the Comptroller General is also in fact a superior officer.

If such officers are not so regarded, then the Myers opinion leaves a loophole for narrowing the practical consequences of its deductions as to the President's absolute power to remove officers appointed by him. But it does this only in case Congress is willing to vest the appointment of members of (say) the Interstate Commerce Commission in department

⁸⁸ *United States v. Germaine* (99 U. S. 508). The Court refused to consider the Commissioner of Pensions a "head of department" for appointing purposes. It declared that a bureau chief would not be so regarded, either. It referred to "inferior" officers as those "inferior to those specially mentioned." This was a *criminal* case.

⁸⁹ Article II, sec. 2.

⁹⁰ Article II, sec. 2. The expressions are, in one place, "heads of departments," and in the other, "the principal officer in each of the Executive Departments."

⁹¹ Rogers, *The American Senate*, p. 41, note 14.

⁹² See note 87 above.

heads or in the courts. This neither Congress nor the country is apt to relish. Hence, we are still left in a predicament with reference to officers actually superior in the sense of being of major importance but perhaps technically to be called inferior by a Court that may be seeking a means of narrowing the application of the Myers case.

This predicament could be partially overcome, if the Court held that Congress could regulate the tenure of those inferior officers whose appointment it vested in the President alone. The Myers opinion left this issue in doubt, but the Chief Justice strongly hinted that, in his view, this could not be done. Even if it could, and even if it were advisable for the President alone to appoint quasi-judicial officers, it may be doubted whether in practice the Senate would be willing to give up so large a part of its check upon appointments.

At the very best, then, the Myers opinion would not allow Congress sufficient leeway. For there is a high degree of probability that the Court would consider department heads non-inferior officers. And this would make impossible any genuine application of the Norris plan for making the Postmaster General independent of the President. And even if certain important officers were styled "inferior" in a technical sense, their tenure could be regulated only if and when Congress agreed to scatter responsibility for their appointment among department heads, or to impose a politically dynamic power of

appointment upon the courts," or to release the President from the senatorial check upon his selections. In the latter case, Congress might not gain any authority by abandoning the senatorial check.

It seems fair, therefore, to deny the expediency of the loophole left by the Myers opinion for congressional control of tenure. Its expediency is dependent, at best, upon several important but doubtful questions being decided in particular ways. And even then, it would not be likely to prove practicable because of the probable unwillingness of the Senate, in the case of important officers, to pay the pound of flesh which the Court exacts as the price for congressional control over tenure.

For these reasons we shall seek in Part III to elaborate a clear-cut theory of tenure under the Constitution which will avoid all these quibbles into which the Myers opinion has, for the moment, drawn us. But we must first, in Part II, compare the relative expediency of legal versus customary restraints upon the President's power of removal.

⁹⁸ The appointment of the "judges" of "legislative courts" might with reasonable safety be left to the Supreme Court; also the appointment of the Comptroller General and the Assistant Comptroller General. Not so, under present conditions, the members of the Tariff Commission and various other agencies which Congress might desire to make independent, but which deal with subjects which are as yet the "football" of politics in one way or another.

PART II
LEGAL VERSUS CUSTOMARY SAFEGUARDS
OF INDEPENDENCE



CHAPTER IV

LEGAL VERSUS CUSTOMARY SAFEGUARDS OF INDEPENDENCE

EXTRA-LEGAL RESTRAINTS UPON THE POWER OF REMOVAL VERSUS LEGAL LIMITATIONS THEREOF

Granted that independence of tenure is desirable, we find that there are two ways in which it may be obtained: (1) Legal limitations, imposed by Congress and sanctioned by the courts, upon the President's power of removal. This includes prohibition of removals, which would mean tenure indefinitely or for a fixed term, subject only to impeachment proceedings. (2) Extra-legal restraints upon a constitutionally absolute power of removal at pleasure, such restraints taking the form of constitutional *mores*, practices, standards, customs, conventions, or however one chooses to designate an habitual attitude toward the situation on the part of Presidents and of the "public," or at least the "effective public."¹

It is of course clear that legal restraints not sanctioned by habits of political behavior are easily evaded, nullified, and reduced to "paper" or "theoretical" checks. This is but to say that legal forms are ineffective in so far as they are contrary to dominant practice. However, it is also true that, since people brought up under a régime of law are

¹ Cf. Lowell, *Public Opinion and Popular Government*, pp. 12-15.

conditioned² to a certain reverence for legal prescriptions, legal rules influence practice, as well as *vice versa*. The existence of a legal limitation may help form a custom or practice; and, other things being equal, it is safer in important matters to provide by law for the desired end, at least where that end is reasonably attainable and where it does not run entirely counter to the firmly engrained habits of a people.

In making this two-fold classification, then, it becomes clear that we do not imply that legal restraints and governmental practices bear no relation to each other. All that our distinction presents are the alternatives of prescribing legal limitations and of omitting them and trusting solely to extra-legal restraints. In this connection our main thesis is that Congress should have the power in its discretion to prescribe legal limitations upon the removal power.

SUFFICIENCY OF EXTRA-LEGAL RESTRAINTS IS CONCEIVABLE

It is, of course, quite conceivable that there should be developed extra-legal restraints of such a binding force as to suffice. Constitutional practice has wrought fully as great modifications of formal constitutions and laws as this. If independence of tenure is demanded by "public opinion," it will come. It is a question of constitutional *mores*, of accepted stand-

² Cf. Watson, *Behaviorism*. The reader may accept this application of the idea of the "conditioned reflex" without accepting Mr. John B. Watson's psychology *in toto*.

ards of action.³ We have many analogous instances of self-restraint in the exercise of legally permissible discretion scattered throughout the history of modern constitutional government. A few of these may be briefly called to mind. The Senate has usually confirmed major presidential appointments, especially those to cabinet posts. The French executive has not arbitrarily removed a "judicial" member of the *Conseil d'Etat* since 1879.⁴ The Executive Orders by which Presidents have added to the classified services may be regarded as self-denying ordinances. Bureau chiefs in several of the departments in Washington have a practical stability of tenure.⁵ Even with the question of their power unsettled, Presidents have respected the intent of Congress by not overtly interfering with the Interstate Commerce Commission. And Professor Robson assures us that, in England, political interference with quasi-judicial functions is a "bogey" even where such functions are committed to the ordinary administrative departments.⁶ This latter point might, to be sure, be read as an argument against the necessity for legal independence of tenure; but that would

³ This cannot, however, be secured by merely wishing for it. Legal prescription is the most direct means of hastening the desired result. Legislation which is somewhat in advance of current practice may have an educational effect, though if too much in advance of practice, it may cause a reaction in the opposite direction.

⁴ Sait, *Government and Politics of France*, p. 388.

⁵ See Macmahon, "Bureau Chiefs in the National Administration of the United States," in *American Political Science Review*, August and November, 1926.

⁶ Op. cit., pp. 282-288. See, however, the warning contained in Hewart, *The New Despotism*.

be to assume that conditions in America and in England are substantially alike. Of this we shall presently speak.

Our examples of restraint in the exercise of legally permissible discretion are taken at random. There are several, however, which are directly in point with reference to the removal power; notably, the practically independent position of the *Conseil d'Etat*, the stability of some federal bureau chiefs, and the lack of partisan interference with quasi-judicial functions handled in England by the ordinary departments.

THE QUESTION OF THE SUFFICIENCY OF RELIANCE UPON CUSTOM UNDER EXISTING AMERICAN CONDITIONS

Foreign examples of self-restraint do not answer this specific question. Nor do particular instances taken from federal practice, except as to the particular situations concerned. For, in the wide field of federal government, restraints operate in one connection which in another are wholly or partially absent. We must seek to avoid overgeneralization from particular instances.

In general, the probability that such extra-legal restraints would develop in this country seems less than for England. The English are more habituated to customary restraints; while we look more to the letter of the law. In fact, raw politics and the influence of pressure groups are now so predominant in our life that they often evade legal restraints.

They can, therefore, hardly be depended upon to build up extra-legal checks.

When we begin to particularize, however, we find that different answers must be given in the case of different tribunals. The public has from the first regarded the Interstate Commerce Commission as essentially judicial in character, and there has been a minimum of political interference with its activities. The other commissions might be ranged in a series below it in descending order of independence. At the bottom would probably stand the Tariff Commission, at least for the period of the Harding-Coolidge administrations.

Perhaps we may tentatively venture the broad generalization that regulatory bodies which have been deliberately marked as supposed to act in the judicio-scientific spirit have been less interfered with, through direct political pressure, than at least certain investigatory bodies whose conclusions were of significance for partisan politics, or than other regulatory bodies composed of *ex officio* political officers or dealing with matters of especial partisan or economic importance, or than business-operation boards. This, however, is a generalization based upon insufficient data concerning a few specific boards, combined with a guess of what one might reasonably suppose to be the case. It is merely thrown out to indicate that one factor in such differences as exist may be due to the neutral or dynamic significance for partisan politics or economic control of the functions of a given board.

LESSONS FROM PRESIDENTIAL INTERFERENCE WITH THE
TARIFF COMMISSION

The tariff controversy has so long been a matter of partisan politics, and lends itself so readily to trading and log-rolling between "pressure groups," each with its special interest, that the mere establishment of a fact-finding tribunal could hardly be expected to alter this attitude. Under Republican Presidents, in whose creed high protection is an article of faith, it was to be expected that interference would be attempted. That it was, has been made clear by the testimony offered at the hearings of the select committee of the Senate authorized to investigate this Commission.⁷

From these investigations we may glean some interesting side-lights upon the way in which political pressure can subtly operate to influence the activities of a supposedly "judicial," fact-finding body. We must not be understood to imply that this experience is universal with federal boards. As we have indicated, we have reason to believe that it is not. Nor do we mean to condemn categorically the two Presidents whom we shall criticize. We are proceeding on the assumption that the Federal Tariff Commission was set up to search for "facts" as a "scientific" operation, and hence to carry to its work "judicial impartiality." Presidents Harding

⁷ Hearings Before the Select Committee on Investigation of the Tariff Commission, United States Senate, 69th Congress, 1st sess. (1926). Hereafter to be referred to as "Hearings."

and Coolidge evidently proceeded upon assumption that the body was a presidential agency. The Tariff Act of 1922, sec. 315,⁸ drawn up at the insistence of Mr. Harding, did offer an excuse for his and President Coolidge's attitude. The most significant thing, then, about the situation, has been the inconsistency of Congress in subordinating to the President a board meant to be "judicial" in spirit, in the determination of "facts" really non-existent except as a result of highly debatable inferences.⁹ These hearings bring out sharply the change of atmosphere in a commission which a partisan presidential attitude toward the body may produce. They serve to emphasize the importance of so organizing these bodies as to give no excuse to Presidents for partisan interference. In that limited sense they are thus an argument in favor of the general thesis that, whether such dangers exist for the moment or not, it is best to be on the safe side in making these bodies independent of the removal power, or at least removable only for cause. They are not offered as proof that legal limitation is, even under present conditions, in all cases necessary, but merely as bits of evidence that it may in certain cases be desirable. It may be doubted whether even legal limitations would have sufficed during the last two administrations, the philosophy of the last, especially, having

⁸ 42 Stat. at L. 858. See chap. III above.

⁹ Cf. Tausig, article reprinted in *Hearings*, Part I, pp. 30 ff.; and Page, *Making the Tariff in the United States*.

been so favorable to all special business interests. Appointees at least would have been partisans of high protection—which indicates that, aside from the Senate, only constitutional *mores* can preserve the “judicial” quality of these commissions from assault through the appointing power.¹⁰ But if a genuine effort is to be made to make such bodies independent, it is clear that legal independence of tenure can seldom if ever diminish, while it may often promote independence of judgment.

With these general considerations before us, we may proceed to examine some particular instances of presidential interference which were brought out in the tariff hearings.

THE PRESIDENT AND THE TARIFF COMMISSION: PARTICULAR INSTANCES

We need not rely upon charges which involved subtle questions of presidential motives, in order to substantiate our thesis. The charge that President Coolidge sought to get Commissioner Culbertson to delay the sugar report, under tacit threat of removal on the basis of a technical charge of illegal action brought by a sugar lobbyist, and that he later got rid of him by “promotion” to the post of minister to Rumania, was not substantiated by Mr. Culbertson’s own testimony.¹¹ One’s view of the

¹⁰ Cf. Hearings, Part III, p. 271; Part V, pp. 567-570; and other citations of note 12 below.

¹¹ Hearings, Part III, pp. 371, 410; Part V, pp. 540-552; Part VI, pp. 751-755, 772, 777, 779-780, and *passim*.

matter is the result of a rather subtle inference. Yet the charges show the atmosphere that had settled on the Commission. And there were other undisputed examples of presidential action which was improper, whatever the motive, provided our conception of these commissions as "judicial" bodies is correct. In criticizing these presidential acts, we are really criticizing the assumptions about their relation to the Tariff Commission which Presidents Harding and Coolidge made.

For one thing, some of the testimony charged that "lobbyists" had been placed on the commission.¹²

Again, President Harding had in 1923 sent to Mr. Culbertson a letter which said in part:

I only venture to say at this time that I think it is altogether desirable to hold up a declaration of broad policy until I can sit down and go over the entire situation with the commission. As I understand it, the commission is the agency of the President in dealing with the tariff problem, and my intimate association and final responsibility in all matters lead me to believe that it is highly essential for a thorough understanding before embarking on any definitely defined course.¹³

Dr. Page testified that President Harding had interfered to influence appointments of employees of the Commission on at least two occasions. The incidents illustrate so clearly the dangers involved in making these commissions mere creatures of a

¹² Hearings, Part III, p. 271; Part V, pp. 567-570. Cf., however, Part I, pp. 22-27, 60-61; Part II, pp. 114, 138, 171-172, 188-197; Part III, pp. 398-403; Part IV, p. 434; Part VIII, pp. 967, 1003; Part X, p. 1378. Cf. Rogers, *The American Senate*, pp. 45-46.

¹³ Hearings, Part III, p. 361.

politically minded President that they deserve to be quoted in full:

Mr. Page. I hate to deal in personalities, Senator. Perhaps, however, I might mention one instance, which I do not think reflects discredit upon the commission. There was a man who was employed by the commission I think on the recommendation of Mr. Marvin in the first place, in connection with an inquiry into the lithographing and printing business. He was given a temporary appointment on the commission, and when the term of his appointment expired it did not seem to me that he had made good in his work, and I spoke to Mr. Marvin about it, telling him that I thought the man should not be reappointed. Mr. Marvin did not agree with me about the quality of the man's work—it was, of course, a matter of opinion—and said that he would like to vote in favor of his reappointment when the matter came up; and so, when the matter was brought up, Mr. Marvin voted in favor of him and I voted against him. There was one member of the commission, however, who had on previous occasions very emphatically and forcibly expressed his opinion that this man was not fit for reappointment, and had said that he was going to vote against his appointment. When the matter did come up, however, this member of the commission voted in favor of the man's reappointment, and in explanation he said that the President had sent for him and had told him that he wished to have this man reappointed, and that it was therefore in accordance with the express desire of the President that he was voting as he did.

Senator La Follette. Was that under the Wilson or the Harding administration?

Mr. Page. That was under the Harding administration.

Senator Bruce. Did you ever know of anything of that kind during the Wilson administration?

Mr. Page. No question of that kind ever came up during the Wilson administration.¹⁴

The second incident is recorded as follows:

Mr. Page. So the President, so I was told by members of the commission, did send for these members and urged rather strenuously that the man who was serving then as secretary of the commission should be dismissed and that this other man should be given the appointment. The member for whom the President sent told the President that he himself was not in favor of the change, and that even if he were that he could not bring it about because he could not get a majority of the commission to support the proposal, and the President was displeased, so I am told, with the attitude of this member of the commission in not making a sufficient effort to bring about the change.

Senator Reed. This was President Harding?

Mr. Page. This was President Harding.¹⁵

The man the President desired was a Republican, and since the incumbent had been satisfactory, Mr. Page regarded the proposal "to turn him out and put in another man" as "an entirely improper act."

The most startling incident, however, was President Coolidge's action in the case of Commissioner Lewis. Mr. Lewis' term as a Democratic member of this bi-partisan Commission expired in September, 1924, during an adjournment of the Senate. Mr. Coolidge told Mr. Culbertson he desired to have an interview with Mr. Lewis to arrange for his re-appointment, but that he desired Mr. Lewis to bring with him a letter of resignation in the following

¹⁴ Ibid., Part I, pp. 66-67.

¹⁵ Ibid., Part I, p. 67.

form: "I hereby resign as a member of the Tariff Commission, to take effect upon your acceptance."¹⁶ In a contemporary memorandum Mr. Culbertson recorded:

In explanation of his request the President said that he desired to be free after the election concerning the position filled by Mr. Lewis. He said that if he were not elected, the Democrats might undertake to hold up other appointments which he made during the next session of the Senate, and he implied that he desired to use the reappointment of Mr. Lewis for trading purposes in case of necessity.

I thereupon asked the President whether I could have his assurance that if he were reelected Mr. Lewis would be continued as a member of the Tariff Commission. He said that he could not at this time make any commitments.¹⁷

Mr. Lewis went to the White House, and what happened there is recorded in his own contemporary memorandum:

September 8, 1924. Pursuant to attached memo of Mr. Culbertson, I visited the President about 3.30 p. m. He received me cordially and said, "Mr. Lewis, I am going to reappoint you," and proceeded to sign the commission. He asked, "Did you bring along the letter (of resignation, etc.)?" I answered, "No, Mr. President; in such time as I have had to consider the matter I have concluded that I cannot feel free to sign such a paper." He seemed much disappointed and remarked that it did not make any difference since I was only appointed at the pleasure of the President, emphasizing "pleasure of the President"; that if it was necessary for us to separate, it would be done more pleasantly through a resignation; that he had no present idea of using it. But he was

¹⁶ Ibid., Part VI, p. 776.

¹⁷ Ibid.

plainly disappointed. He signed the commission and directed me to take it. I said, "Mr. President, only you and I know this commission has been signed. I want to be honorable and fair with you. You may destroy it." He answered, "No; that it was only his pleasure, etc."; that he had no idea of using the resignation, etc.

D. J. L.¹⁸

However, at the next session of Congress Mr. Coolidge sent in the name of another man to the Senate, and Mr. Lewis' virtue was its own reward.

This Coolidge invention for the control of such commissions might of course be employed were their members guaranteed by law independence of tenure. Only constitutional morality would protect *judicial* appointees of the President from being subjected to a similar humiliation and possible control. There could be no better indication of the unwisdom of a presidential power arbitrarily to remove such officers, or of the fact that constitutional *mores* are overwhelmingly more important than legal limitations.

These several incidents were, it seems, due in large measure to the fact that sec. 315 of the Tariff Act of 1922 was so drawn as to imply, at least, that the Commission was a mere agency of the President, and that it placed upon that body the duty of discovering non-existent "facts." Both Taussig and Page have clearly shown that the bare formula "differences in costs of production" is not a question of simple fact, obtainable by research. This nat-

¹⁸ Ibid., p. 775.

usually made it important to place upon the Commission men with "correct" views on protection in general. In the words of Professor Taussig, "The proper figures do not, automatically, emerge," and hence there is inevitably "play for preference, bias, prejudice."¹⁹ Dr. Page did not believe that the Commission should itself be given tariff-fixing powers, but that it should be an agency for presenting data to Congress in order that it may fix rates more intelligently.²⁰ All of which points to the conclusion that the various bodies which we class together as administrative boards differ markedly in their functions, and that in the last resort each of them must be treated as a special problem by itself. This does not, however, invalidate our major premise that where Congress delegates regulatory or fact-finding duties to such a body, it is expedient that there be a guarantee of independence of tenure. It means simply that Congress should not give the board a status which it is impossible for it to maintain in a judicial spirit, or which will inevitably drag it into politics.

THE COOLIDGE-HANEY INCIDENT

One more example of the Coolidge conception of these commissions may be given. It may be of some significance that this incident related to a member

¹⁹ See note 9 above, and chap. III above, section on "The Tariff Commission."

²⁰ Hearings, Part I, pp. 45-49, 64, 73-75.

of a business-operating commission. President Coolidge constantly preached against the government's itself entering the field of business. Thus he pocket-vetoed the bill by which Muscle Shoals was to be operated by the government for the production of nitrates and power. Later he explained that this bill, so earnestly advocated by Senator Norris of Nebraska, put the government into the "retail" business.²¹

In passing, it may be said that whether the government should engage in business is not a question that can be answered in the abstract. It is meaningless except in connection with a concrete situation, involving a particular sort of business under given conditions. We may accept Mr. Coolidge's *dictum* in the sense that the dominant opinion is that for most businesses private operation is under present American conditions to be preferred. But strenuous demands are made that the government enter into this or that particular enterprise; and these borderline cases cannot be settled intelligently by mere deduction from a universal formula.

At any rate, the operation by the government of the merchant fleet, under the United States Shipping Board, is in violation of such a universal *dictum*; and the general understanding is that Mr. Coolidge was displeased with the attitude of certain members of the Board who seemed opposed to a policy of

²¹ Hart, "The President and His Policies," in *American Year Book*, 1928.

curtailment of this government enterprise. But whether this is or is not the key to the situation, the President sent to Mr. Haney the following telegram.

EXECUTIVE OFFICE,

LYNN, MASS., August 27, 1925.

Hon. B. E. Haney,

United States Shipping Board:

It having come to my attention that you are proposing to remove Admiral Palmer contrary to the understanding I had with you when I reappointed you, your resignation from the United States Shipping Board is requested.

CALVIN COOLIDGE.²²

This telegram implied not only that the President had the power to remove a member of the Board—for otherwise it would have been improper for him to “request” his “resignation”—but that it was proper for the President to exact from such a member an “understanding” as to how, if reappointed, that member would exercise the discretion vested in him by law. It implied, furthermore, that the President may properly remove a member of such a board, not merely after what he considers an unsound decision, but in anticipation of such a decision.

The telegram illustrates the artificiality of that portion of the Myers opinion²³ in which the Chief

²² Congressional Record, 69th Cong., 1st sess., p. 1944.

²³ See *Power of the President to Remove Federal Officers*, Senate Document 174, 69th Cong., 2d sess., 227. It may be added that we doubt whether Chief Justice Taft would consider the Shipping Board a judicial or quasi-judicial body. He would, we may guess, consider it a body to which statutory duties had been so specially committed that the President, though he could remove the members, could not overrule or revise their decisions. See chap. V below.

Justice says that while the President might act improperly if he interfered with a quasi-judicial decision, he might, after the decision, remove a commissioner for having made it. The two things are not to be separated in this artificial fashion. The power of removal carries with it, by the psychology of the situation, something of a power of direction, which is apt to be exercised except to the extent to which constitutional *mores* stamp it as improper. But there is always the excuse at hand that it can never be improper to exercise authority which is implicit in the power of removal. It is especially for this reason that the power to remove officers whom it is desired to make independent in judgment should be subject to congressional limitation or prohibition.

The propriety of the President's attitude in this case turns, in the theory of Chief Justice Taft just referred to, upon whether the Shipping Board is meant to be "judicialized" in the same way as regulatory tribunals like the Interstate Commerce and Federal Trade Commissions. If so, his action in conditioning reappointment upon an "understanding" of the sort indicated, and his reference in his request for resignation to anticipated exercise of discretion, were both "improper." In the Chief Justice's view, however, the attempt to force Mr. Haney to resign was, taken by itself, not improper, but both proper and constitutional. The term "improper," it should be noted, in this connection can mean merely "constitutionally unethical."

If, however, we reject this unreal distinction, the propriety as well as the legality of the President's action turns upon the question whether or not the President has the constitutional power to remove members of the Shipping Board at will. If he has, then the whole attitude of Mr. Coolidge was justifiable, or at least could be "justified" by any President who cared to take his view. For while we must admit that a very scrupulous President might observe, and perhaps should observe, the Chief Justice's theory of his relation to "quasi-judicial" bodies, the whole matter is, from this standpoint, one of extremely refined and, under existing standards, highly artificial ethical distinctions. For this reason our conclusion, on grounds of political science, is that the expedient principle is for Congress to have authority to make the members of such boards as it intends shall act in a "judicial" or "scientific" capacity, independent of the power of removal.

What was the intent of Congress? We may profitably reproduce in full the reply of Mr. Haney; for it contains the interpretation by a member of the Shipping Board of what the status of that Board is meant to be:

August 28, 1925.

The President,

Executive Office, Lynn, Mass.

MY DEAR MR. PRESIDENT: I am in receipt of your telegram of the 27th instant, reading as follows: . . .

When you honored me last June by tendering a reappointment, I stated that I was reluctant to accept, not only for

personal business reasons, but because I was not in sympathy with retaining President Palmer at the head of the Fleet Corporation.

At your request, the reasons for my opposition to President Palmer were fully and frankly stated, and were, in substance, as follows: First, without questioning his ability as a naval officer, I considered him incompetent from temperament and lack of experience to discharge the duties imposed by the merchant marine act of 1920 upon the Shipping Board, whose Agent he was; second, because he seemed determined not to confer with the board upon any of the questions which came within its peculiar province under the statute, which involved the board's discretion, and could not be delegated to the president of the Fleet Corporation; and, third, because he seemed disposed to proceed along lines independent of board action, although he was by his appointment created the board's agent. This course, in my view, was in some instances a violation of the statute, or not in accordance with the legislative intent expressed in the statute.

Upon your invitation, I stated at length my views on these subjects without equivocation or evasion. There certainly was no express understanding concerning the continuance in office or removal of President Palmer. I regret exceedingly that you could have any misunderstanding as to my purpose and intent in the event of my reappointment, for I knew that you had been informed by Senator McNary that I would not, and in addition to that, I myself had definitely advised you that I could not accept a reappointment if any conditions whatsoever were attached to that reappointment.

I did not intend by word or act to lead you, directly or indirectly, Mr. President, to understand that if reappointed I would be a party to continuing Mr. Palmer as president of the Emergency Fleet Corporation. You knew that I had voted against his reelection within two weeks before the time we had our conference on the subject of reappointment. You also

know that I vigorously opposed the adoption of a resolution granting any powers to the president of the Fleet Corporation which the statute expressly imposed upon the board itself.

I did not intend by word or act to lead you to think my view of President Palmer and his activities, which I expressed to you, would change unless there was a change in his administrative policy. Under these circumstances, in justice to myself, I am compelled to say to you that I am not conscious of having in any way caused you to have reached the understanding referred to in your telegram.

Obviously, Mr. President, to have given you any such promise as that implied by your telegram would have amounted to a total disregard of my oath of office and my obligation to Congress, whose sole agent I am. Such a promise and disregard of my official oath and the consummation of such an understanding would have obligated me to support the administration of the merchant marine act by the President of the Fleet Corporation, however inefficient, notwithstanding the fact that the law imposed upon me, as a commissioner of the Shipping Board, the duty to support and maintain an efficient administration.

I think that I understand the purposes which Congress had in mind when the merchant marine law was enacted, and when it by law, in express terms, required the President to recognize bipartisan appointments and geographical sections in the appointment of the members of the board. The act specifically declares its purpose to be to create a merchant marine (1) for the national defense, (2) for proper growth of our foreign and domestic commerce, and (3) to serve as a naval or military auxiliary in time of war or national emergency. I respectfully direct your attention to the fact that while the merchant marine act of 1920 provides for the operation and disposition of vessels and shipping property, it also directs the board to keep clearly in mind at all times the declared purposes of the act which I have mentioned.

The board, when once appointed by the President in conformity with the statute, is an independent agency of the United States Government and is vested by the statute with large and important discretionary powers, which the members thereof are compelled to exercise independently of any other governmental agency so long as the law is in force, and, with the exception of the power of removal for causes specified in the act, the members of the board are responsible only to the legislative body.

The powers conferred upon the board are largely judicial in their nature, involving the exercise of discretion, and these powers cannot be delegated by the board to Mr. Palmer or any other agent. It may be answered that if any of these powers have been delegated to the president of the Emergency Fleet Corporation it was done by act of the board itself. But even if that be conceded, the attempted delegation of power does not deprive any individual member of the board of the right to express his opinion as to these powers and to vote, under the sanction of his oath of office, as his judgment may direct.

If, therefore, I am to be asked to resign because I have seen fit to exercise the power expressly conferred upon me by Congress in urging the removal of an inefficient agent of the board, then I submit that the control of the operation and disposition of the merchant fleet is taken from this bipartisan and sectionally constituted board and placed in the hands of one man, for whose actions the board is responsible but whose actions it can not direct or control.

My opposition to President Palmer's administration, in addition to the reasons above stated, is based upon the following:

His policy, of necessity, fails to carry out the purposes of the merchant marine act, because such policy not only is failing to establish a Merchant Marine sufficient to carry a major portion of our commerce, but, on the contrary, our merchant marine is carrying less and less each year.

Again, the purpose of the act to establish a military and naval auxiliary is being disregarded in that the number of vessels in use and available for such purpose is being steadily reduced; and last, but not least, under his administration we are losing American commerce to foreign shipowners, one of the very things the act in question intended should not occur.

Under these circumstances, Mr. President, for me to comply with your request that I resign would carry an implication which I can not permit.

Very respectfully,
BERT E. HANEY.²⁴

Mr. Coolidge did not press the issue by attempting to remove Mr. Haney.

The very fact that Commissioner Haney resisted the attempt of the President to control his vote as a member of the Board, and to force him to resign, indicates that high-minded officials who regard their functions as quasi-judicial will not submit to direct political pressure of this sort. However, it is equally clear that in such cases another view of their relation to the President may be taken, as it was taken by Mr. Coolidge himself in this instance. The President's view is even more tenable under the influence of the Myers opinion than it was in 1925, despite the *dictum* of that opinion as to the "propriety" of such a situation. The importance of custom, unsupported by legal limitation, as a restraint upon the President, is clearly different in different cases. For there is nothing except constitutional morality and the fear of censure to prevent a President's

²⁴ Op. cit. in note 22, at pp. 1944-1945.

exacting promises from persons as a condition to their appointment to the federal bench itself. Because such an exaction seems almost unthinkable, it does not follow that it is quite so unthinkable that a similar exaction should be made in the case, let us say, of Federal Trade Commissioners. Still less does it follow with reference to the Federal Tariff Commission and to the United States Shipping Board, bodies which for one reason and another have not so explicitly, or so generally, come to be regarded as "judicial." Another commissioner might have taken a similar view of his relation to the President that the Chief Executive himself took in this incident. The conclusion, therefore, which we draw, is, that this case supports the generalization which we drew from the tariff hearings: that, while constitutional morality is in general more essential than legal forms, legal forms may aid the development of a constitutional usage by making their violation unequivocally open to censure; and that, where the purpose of Congress is to create a body intended to exercise its functions, whether regulatory, investigatory, or business-managing, in the judicio-scientific spirit, Congress should have the power to prevent, so far as possible, direct political pressure from being brought to bear upon the members, by expressly limiting the President's power of removal. This will have three results: (1) it will tend to make all parties consider such bodies as we have come to consider courts—as independent and

not properly subject to pressure; (2) it will make a President who exerts such pressure liable to censure, and will strengthen the hands of members in resisting it; (3) and it will make unenforceable by judicial process the illegal removal of such members, if such should be attempted by the President. It will not of itself guarantee that pressure through the weapon of appointment or reappointment will not be attempted; nor will it make it utterly impossible for a President, under certain circumstances, to cause a member to prefer to resign rather than resist subtle and indirect pressure efforts. But it may be said that it strengthens, in very considerable degree, the probability that such bodies will be regarded as independent establishments, in fact as well as in legal theory.

Conclusion. We postulate, therefore, partly upon the basis of the concrete instances cited, but especially upon the basis of common experience as to the probably most effective means of obtaining the end of actual independence, that from the standpoint of political science, legally guaranteed independence of tenure is desirable for those bodies which Congress seeks to establish as actually independent.

We may, however, before proceeding to the constitutional inquiry as to whether Congress may make such guarantee, give a final summary of some other postulates which we carry to that inquiry.

Our argument concerning independence has been expressed in terms of the desirability of having cer-

tain agencies, especially regulatory bodies,²⁵ free from the pressure of political superiors or special interests. But whether in a given instance such a board should be created, and whether it is to be made independent, is after all a matter that must be threshed out in each particular case as it arises. What we really desire to stress, therefore, is that, while we can set forth some general considerations on the matter, the question in the concrete is one of legislative policy. We shall see later that Congress can do this only when creating bodies to carry out its own legislative powers, not when creating agencies to aid the President in the exercise of the special prerogatives delegated to him in the Constitution.²⁶ But we hold that, within these limits, it should be for Congress to determine when such an independent body is to be set up. It is with this final conclusion that we turn to the elaboration of our third thesis.

²⁵ See chap. II above.

²⁶ See chap. V below.

PART III

A CONSTITUTIONAL THEORY OF
THE REMOVAL POWER

CHAPTER V

THE MYERS DECISION VERSUS THE MYERS OPINION

THE FACTS OF THE CASE¹

On April 24, 1913, the late F. S. Myers was appointed postmaster at Portland, Oregon. He was reappointed by the President for a four-year term dating from July 21, 1917, and his appointment was confirmed by the Senate. On January 22, 1920, his resignation was requested by the First Assistant Postmaster General; but Myers refused to resign. On February 2, 1920, the Postmaster General telegraphed him that the President had issued an order removing him from office. He replied that since his removal was contrary to law, no vacancy existed in the office. Nevertheless, a post-office inspector took charge of the office on February 3, 1920, drawing his salary as inspector, not as postmaster. During his continuance in charge of the office, the salary of postmaster was paid to no one. On the date of the order of removal the Senate was in actual session, and continued in session until June 5, 1920. During that time the President did not communicate to the Senate the removal of Myers, nor request that body

¹ The facts are substantially as given in *The Power of the President to Remove Federal Officers*, Senate Document 174, 69th Cong., 2d sess. This useful volume gives a transcript of record, the briefs and oral arguments on reargument before the Supreme Court, and the majority and dissenting opinions of the Supreme Court justices.

to consent to his removal, nor nominate his successor. On August 26, 1920, the Senate not being in session, the President appointed John M. Jones as postmaster at Portland, and Jones took office on September 19, 1920. Congress convened in regular session December 6, 1920. That session expired March 4, 1921, without any appointment of plaintiff's successor by or with the advice and consent of the Senate. The next Congress was in session from April 11, 1921, until August 24, 1921, and, after a recess, from September 21, 1921, to November 23, 1921. On July 21, 1921, the term of Myers under his second commission expired. At neither of the last-mentioned sessions did the Senate consent to the plaintiff's removal or to the appointment of his successor. Myers brought suit for the salary of the office from January 31, 1920, to July 21, 1921, claiming \$8,838.72 to be due to him as salary for that period. After the submission of the cause, the appellant, Myers, died, and his wife, as the administratrix of his estate, was duly and regularly substituted as appellant.

The case came to the Supreme Court in the October term, 1924, on appeal allowed from the Court of Claims. The latter had dismissed the petition of Myers on the ground that he was guilty of laches: "The plaintiff can not recover because the action of which he complains was taken in February, 1920. This suit was brought April 25, 1921. If any right of action for salary arose out of the action

complained of the delay is fatal to any recovery.”² But the Court of Claims declared: “However, the Supreme Court has never directly passed on the validity of the tenure of office acts. The question has been expressly saved. . . . Such being the case, and the Supreme Court having ‘expressly saved’ the question, and there being ‘doubt and discussion’ as to the validity of these acts, the doubt should be resolved by this court in favor of the power of Congress; and this court will not declare a statute unconstitutional, especially in view of the declaration by the Supreme Court that the question is a doubtful one.”³

This statement refers to the statute under which Myers had been appointed, and upon which his claim had been based. This statute declared:

Postmasters of the first, second and third classes shall be appointed and may be removed by the President, by and with the advice and consent of the Senate, and shall hold their offices for four years unless sooner removed or suspended according to law.⁴

Myers had contended that under this provision he could be removed during his four-year term only with the consent of the Senate; that the consent of the Senate had not been obtained during his term; and that his removal was therefore illegal and void, and he was entitled to the remainder of his salary. The United States had maintained that he had been

² Ibid., p. 24.

³ Ibid.

⁴ 19 Stat. at L. 80.

removed under the constitutional power of the President, which power existed notwithstanding the statutory provision quoted; that the statute was unconstitutional, and could not deprive the President of the power conferred upon him by the Constitution; and therefore that Myers was not entitled to his claim.

The Supreme Court ordered a reargument, inviting Senator Pepper of Pennsylvania, as *amicus curiae*, to represent the interests of the Senate. Thus it was that the final decision was postponed until the October term, 1926. In that decision the Supreme Court was faced directly by the question of the constitutionality of the statute. For it held that Myers was not guilty of laches;⁵ and, since the President had not received the consent of the Senate to the appointment of Myers' successor before the expiration of his term, the Court could not, as it had previously done,⁶ refrain from passing upon the main issue by holding that such consent to the appointment of a successor operated as consent to the precedent removal.

THE IMMEDIATE ISSUE AND ITS IMMEDIATE IMPLICATION

The immediate issue in the Myers case was whether the petition of Myers for the remainder of the salary as postmaster at Portland, Oregon, for the period from his removal to the end of the statutory term of office, should be granted or dis-

⁵ Senate Document 174, 69th Cong., 2d sess., pp. 211-212.

⁶ Cf. *Parsons v. United States* (167 U. S. 324).

missed. The immediate order of the Court of Claims was that it should be dismissed.⁷ This judgment the Supreme Court affirmed,⁸ but on different grounds. Having disagreed with the Court below as to the question of laches, the Supreme Court had to affirm or reverse the judgment according as it held the statute in question to be unconstitutional or constitutional. Hence, in affirming the judgment, the Court decided, immediately, that the statute was unconstitutional and hence not enforceable by the courts. This is the minimum "decision," the immediate implication of the order: "Judgment affirmed." What further implications the case may have is a problem to which we now address ourselves.

THE CONCLUSIONS OF THE MAJORITY OPINION

Let us first examine the text of the accompanying opinion, written by Mr. Chief Justice Taft and concurred in by five of his associates. Embedded in an elaborate⁹ historical and deductive essay, the results of the majority theory were expressed as follows:

The constitutional construction that excludes Congress from legislative power to provide for the removal of superior officers finds support in the second section of Article II. . . . The power to remove inferior executive officers . . . is an incident of the power to appoint them, and is in its nature an executive power. The authority of Congress given by the ex-

⁷ Senate Document 174, 69th Cong., 2d sess., p. 24.

⁸ *Ibid.*, p. 249.

⁹ The majority opinion covers 39 printed pages.

cepting clause to vest the appointment of such inferior officers in the heads of departments carries with it authority incidentally to invest the heads of departments with power to remove. It has been the practice of Congress to do so and this court has recognized that power. . . .

Assuming, then, the powers of Congress to regulate removals as incidental to the exercise of its constitutional power to vest appointments of inferior officers in the heads of departments, certainly so long as Congress does not exercise that power, the power of removal must remain where the Constitution places it, with the President, as part of the executive power, in accordance with the legislative decision of 1789 which we have been considering.

Whether the action of Congress in removing the necessity for the advice and consent of the Senate and putting the power of appointment in the President alone would make his power of removal in such case any more subject to congressional legislation than before is a question this court did not decide in the Perkins case. Under the reasoning upon which the legislative decision of 1789 was put it might be difficult to avoid a negative answer, but it is not before us and we do not decide it.

The Perkins case is limited to the vesting by Congress of the appointment of an inferior officer in the head of a department. The condition upon which the power of Congress to provide for the removal of inferior officers rests is that it shall vest the appointment in some one other than the President with the consent of the Senate. Congress may not obtain the power and provide for the removal of such officer except on that condition. . . . It is true that the remedy for the evil of political Executive removals of inferior officers is with Congress by a simple expedient but it includes a change of the power of appointment from the President with the consent of the Senate. . . .

Our conclusion . . . is . . . that Article II excludes the exercise of legislative power by Congress to provide for

appointments and removals except only as granted therein to Congress in the matter of inferior offices, that Congress is only given power to provide for appointments and removals of inferior officers after it has vested, and on condition that it does vest, their appointment in other authority than the President, with the Senate's consent. . . .

It is argued that the denial of the legislative power to regulate removals in some way involves the denial of power to prescribe qualifications for office, or reasonable classifications for promotion, and yet that has been often exercised. We see no conflict between the latter power and that of appointment and removal, provided of course that the qualifications do not so limit selection and so trench upon Executive choice as to be in effect legislative designation. . . .

. . . . To Congress under its legislative power is given the establishment of offices, the determination of their functions and jurisdiction, the prescribing of reasonable and relevant qualifications and rules of eligibility of appointees, and the fixing of the term for which they are to be appointed and their compensation—all except as otherwise prevented by the Constitution. . . .

Made responsible under the Constitution for the effective enforcement of the law, the President needs as an indispensable aid to meet it the disciplinary influence upon those who act under him of a reserve power of removal. But it is contended that executive officers appointed by the President with the consent of the Senate are bound by the statutory law and are not his servants to do his will, and that his obligation to take care for the faithful execution of the laws does not authorize him to treat them as such. The degree of guidance in the discharge of their duties that the President may exercise over executive officers varies with the character of their service as prescribed in the law under which they act. The highest and most important duties which his subordinates perform are those in which they act for him. In such cases they are exer-

cising not their own but his discretion. This field is a very large one. It is sometimes described as political. . . . Each head of a department is and must be the President's alter ego in the matters of that department where the President is required by law to exercise authority. . . .

In all such cases the discretion to be exercised is that of the President in determining the national public interest and in directing the action to be taken by his executive subordinates to protect it. In this field his Cabinet officers must do his will. He must place in each member of his official family and his chief executive subordinates implicit faith. The moment that he loses confidence in the intelligence, ability, judgment, or loyalty of any one of them he must have the power to remove him without delay. To require him to file charges and submit them to the consideration of the Senate might make impossible that unity and coordination in executive administration essential to effective action.

The duties of the heads of departments and bureaus in which the discretion of the President is exercised and which we have described are the most important in the whole field of executive action of the Government. There is nothing in the Constitution which permits a distinction between the removal of the head of a department or a bureau when he discharges a political duty of the President or exercises his discretion and the removal of executive officers engaged in the discharge of their other normal duties. The imperative reasons requiring an unrestricted power to remove the most important of his subordinates in their most important duties must, therefore, control the interpretation of the Constitution as to all appointed by him.

But this is not to say that there are not strong reasons why the President should have a like power to remove his appointees charged with other duties than those above described. The ordinary duties of officers prescribed by statute come under the general administrative control of the President

by virtue of the general grant to him of the executive power, and he may properly supervise and guide their construction of the statutes under which they act in order to secure that unitary and uniform execution of the laws which Article II of the Constitution evidently contemplated in vesting general executive power in the President alone. Laws are often passed with specific provision for the adoption of regulations by a department or bureau head to make the law workable and effective. The ability and judgment manifested by the official thus empowered, as well as his energy and stimulation of his subordinates, are subjects which the President must consider and supervise in his administrative control. Finding such officers to be negligent and inefficient, the President should have the power to remove them. Of course there may be duties so peculiarly and specifically committed to the discretion of a particular officer as to raise a question whether the President may over-rule or revise the officer's interpretation of his statutory duty in a particular instance. Then there may be duties of a quasi judicial character imposed on executive officers and members of executive tribunals whose decisions after hearing affect interests of individuals, the discharge of which the President can not in a particular case properly influence or control. But even in such a case he may consider the decision after its rendition as a reason for removing the officer, on the ground that the discretion regularly entrusted to that officer by statute has not been on the whole intelligently or wisely exercised. Otherwise he does not discharge his own constitutional duty of seeing that the laws be faithfully executed. . . .

. . . . And it therefore follows that the tenure of office act of 1867, in so far as it attempted to prevent the President from removing executive officers who had been appointed by him by and with the advice and consent of the Senate, was invalid and that subsequent legislation of the same effect was equally so.

For the reasons given, we must therefore hold that the provision of the law of 1876 by which the unrestricted power of removal of first-class postmasters is denied to the President is in violation of the Constitution and invalid. This leads to an affirmance of the judgment of the Court of Claims.

These conclusions we may summarize as follows:

1. The power of Congress to vest the appointment of inferior officers in the heads of departments carries with it the power to vest the power to remove them in such department heads, and the power to prescribe incidental regulations controlling and restricting the latter in the exercise of the power of removal. With this there can be no disagreement.

2. The excepting clause does not enable Congress to draw to itself or to either of its branches the power to remove or the right to participate in the exercise of that power. Our position is that this is precisely what the Myers case decided—this and nothing more.

3. Congress may never legislate to provide for the removal of superior officers. We cannot agree to this as a universal proposition.

4. Congress may not legislate to control the removal even of inferior officers unless and until it exercises its authority to vest their appointment elsewhere than in the President with the consent of the Senate. In other words, the fact that Congress has potentially the power to regulate the tenure of inferior officers gives it no power in this respect unless it is willing to forego the check of the Senate, perhaps unless it is willing to have someone other

than the President make the appointment. This will form no part of our theory of the removal power.

5. It is extremely doubtful whether, by merely removing the necessity for the consent of the Senate to the appointment of inferior officers, Congress can make the President's power of removal subject to its control. This also is irrelevant to our theory.

6. Congress may, however, create offices, fix their functions and jurisdiction, prescribe reasonable qualifications and reasonable classifications for promotion, and fix their terms and compensation. This is undoubted.

7. There is no basis in the Constitution, other than that mentioned in 4 above, for drawing distinctions, relative to the power of removal, either in regard to types of functions, or in regard to the rank of the office. The President has the absolute power to remove all appointed by him, or at least all appointed by him with the Senate's consent. With these generalizations we are in flat disagreement.

8. In particular, his absolute and illimitable power to remove extends even to officers to whom discretionary statutory duties are so specifically committed as to raise the question whether he may overrule or revise their decisions, as well as to officers exercising duties of a quasi-judicial character whose decisions it would be improper for the President to influence or control. With this we wholly disagree. The psychological assumption that the power of removal is separable from influence or

control is refuted by common experience; and the Chief Justice himself regards the power of removal as the sanction of supervision and control.

THE MYERS CASE AND STARE DECISIS

Accepting the Myers case as an authoritative pronouncement of the highest Court, and one that under the doctrine of *stare decisis* will very probably be followed in the future, we are nevertheless at liberty to inquire whether it settles once and for all the whole issue. What the Court will do in future cases is a matter of prediction.¹⁰ Let us rather first ask whether its decision in the Myers case *necessarily* settles the whole problem, or only one aspect of it.

This will require an examination of the meaning of *stare decisis*. In the Myers case the Supreme Court for the first time directly upheld the power of the President to remove an officer despite a statutory limitation. Those who discuss the case often assume that, therefore, he has the power to remove any officer whom he appoints, or even any executive officer of the United States,¹¹ despite *any* sort of statutory limitation. This conclusion is drawn from the Myers opinion. But, under *stare decisis*, the word patterns of the Chief Justice are not the law of the land. "Dicta," says Judge

¹⁰ For a definition of law see Holmes, "The Path of the Law," in *Collected Legal Papers*.

¹¹ Professor Corwin holds that the premises of the Chief Justice carry this implication. See his monograph, *The President's Removal Power*, p. 7.

Cardozo, "are not always ticketed as such."¹² *Stare decisis* means to stand by prior *decisions*, not by the words of prior opinions.¹³ Under our system of case law, no particular judgment of itself necessarily establishes any such universal proposition as that Congress can fix no limitations of any sort upon the power which, in its silence, the President has to remove all officers whom he appoints. Any such claim for a particular judgment would be both unsound in theory and contrary to the history of our jurisprudence. To advance as law the conclusion of any such syllogism is a clear case of academic temerity!¹⁴

The premises of the majority opinion are not *per se* rules of law. For the Court may later narrow the application of such premises in a way that logically involves their repudiation. Whether this will be done in the instant case, is a matter of probabilities, not of certain knowledge. To those who mistakenly assume otherwise we may present the warning signal of Mr. Justice Holmes' *dictum*: "Certitude is not the test of certainty."¹⁵

It is pertinent, in enforcing this point, to quote the view of James C. Carter, set forth in a paper

¹² *Nature of the Judicial Process*, p. 30.

¹³ See Oliphant, "A Return to *Stare Decisis*," in *American Law School Review*, VI, 215.

¹⁴ Bertrand Russell has called the syllogism "a monument to academic timidity." *Philosophy*, p. 79.

¹⁵ *Collected Legal Papers*, p. 311.

written in 1884 on "The Proposed Codification of Our Common Law."¹⁶ He said:

The fallacy (and it is a gross one), wrapped up in these plausible assertions that whatever is known can be written, and that if a rule of law can be written by a judge in an opinion, it can be written and enacted in a Code, consists in the false assumption that courts lay down rules *absolutely*, whereas, they lay them down *provisionally* only. They do not, indeed, declare in terms that the rules pronounced are to be taken in reference to the facts which have elicited the opinions, but this is always understood; and whenever a case arises presenting different aspects, the rule is subject to modification and adaptation as justice or expediency may dictate. . . .

This line of thought should be pursued a step further back, in order that we may understand the philosophical reason why the opinions of courts are, and must always be, *provisional*. All unwritten law consists of rules by which the standard of justice is applied to *known* facts and conditions. Apart from, and independent of, *known facts*, there is no such thing, in human apprehension, as *law*, except the broad and empty generalization that *justice must be done*. On the morning of creation the obligation of this precept was felt by the first man. It is the only one we can now truly feel in relation to the unknown facts and conditions which are to arise in the future, and which may present aspects different from any which have been exhibited in the past. Everything which has occurred may be made the subject of judicial contemplation, and the rule of justice in respect to it may be declared; and the declaration may be fitly applied to all like cases which may arise in the future. But here human power finds its absolute limit. . . .

Our unwritten jurisprudence acknowledges and accepts this necessary limitation of the human faculties. The judge never

¹⁶ Pp. 25-29. Mr. Carter goes on, however, to make statements which are inconsistent with this quotation.

undertakes to decide anything more than the precise case brought before him for judgment. He considers the facts of *that case* and, with the aid of such precedents, analogies and familiar rules as the deliberate and accumulated wisdom of the past furnishes, he pronounces judgment, and there stops. He does not even declare, at least not as a necessary part of his function, what the law is. He is not bound to write an opinion. He usually does write one, stating his views upon the legal questions. But this is of no binding force. The strictest doctrine of *stare decisis* requires subordinate tribunals to follow, not the opinion, but the *judgment*; and the obligation is of no force in a future case presenting materially different aspects. If the court in its opinion lays down rules in general terms which *might* embrace cases differing from the one decided, such declaration of rules is *provisional* only, and subject to modification in any future case presenting materially different features.¹⁷ The temptation to judges, in committing their opinions to writing, to lay down a rule calculated to cover future cases which may possibly differ from the one before them, is often yielded to, and this practice is the one principal source of the error which often creeps into the unwritten law. Such rules, not necessarily called for by the actual case, are called "*dicta*"—things *said*, not things *adjudged*; but other courts are often inclined to accept them; subordinate ones, from a partial sense of obligation; others, from a sentiment of respect, and because of the authority which may justly belong to the talents and learning of those who pronounced them. In this manner many an erroneous doctrine has found its way into the law and held its place until its mischievous fruits have compelled it to be challenged. There is no practice which the greatest and best judges of England and America have more thoroughly united in de-

¹⁷ Whether such a case presents "materially different features" is determined at the time by the reflective thinking of the judge who decides the case.

nouncing as a pernicious source of error, than that which leads to the attempt by courts to decide other and future cases, instead of limiting their decision to the *known facts* before them. . . .

. . . . All that is truly known is, that certain actually occurring instances have been decided in certain ways. These are the facts and the only facts. The judges had no function to do anything more, and if they went further and undertook to pronounce a rule which was to apply to any other case than one known to be like it, what they said was mere *opinion*, of no more authority than the opinion of any private individual equally learned. No intelligent judge ever yet professed to *know* the law applicable to a *future* and *unknown* case. . . . Whenever a case arises in the courts presenting features different from any which have been made the subject of judicial decision, the business of a judge is to consider these new features, and determine whether they are *material*; ¹⁸ in other words, whether the case, differing as it does in some of its circumstances, is, or is not, the same in point of *principle*. If it be ¹⁹ the same in such a sense, it is the same for all *his* purposes, and the law governing it is *known*.²⁰ He must apply the same rule as has been applied in the like cases. But if it be not the same in such a sense, if the differences are material, it is a case theretofore *unknown*, and there is no rule truly "*known*" which governs it. Nevertheless, the judge must

¹⁸ Since no two sets of facts are identical, it becomes, as expressed by Professor W. W. Cook, a matter of "matching colors." Some cases appear to the judge to be in all "essentials" like prior cases, and he follows the precedents. Others require reflection on his part, because the differences seem to him to make it doubtful whether the case does not present a "new situation."

¹⁹ Or, rather, if it so appears to the judge.

²⁰ In "clear" cases, the lawyer is apt to advise his client that appeal to the courts will be futile, and the case will not be submitted. Or the lawyer often advises his client not to act against the "law," that is, against his prediction, based upon a high degree of probability, of what a court would decide.

decide the case, and he does so by the exercise of that *capacity* for making a just decision in a novel instance, which his studies and training have created in him.²¹

In short, we must constantly bear in mind Professor Oliphant's recent warning that the tendency has been away from *stare decisis* to *stare dictis*.²² Just what is it, he asks, in prior decisions, which is to be followed? About this point lawyers and judges are often confused. Certainly it is not necessarily any particular words or formulas expressed in the accompanying opinion. The opinion is primarily an "essay in rationalization" ²³ by which the court seeks to explain and justify its decision. Nor is it the "naked judgment" ²⁴ in the prior case. If the latter were the "decision" that is to be followed, *stare decisis* would be impossible. The event never repeats itself. Postmaster Myers is in his grave, and so is President Wilson, who removed him. The particular situation in all its concreteness can never recur. It was settled forever by the affirmation of the judgment of the Court of Claims dismissing Myers' claim for the remainder of his salary.

Generalization thus becomes necessary ²⁵ to the application of *stare decisis*. However, as Professor

²¹ That is, he decides after careful reflection about the consequences which flow from such differences, whether he approach the matter in a "legalistic" vein or in terms of social consequences. At least this is what happens unless the judge mistakenly thinks he is bound by the words of prior decisions or that he must select some particular rule which is in reality an overgeneralization.

²² Oliphant, op. cit. in note 13.

²³ Ibid., p. 224.

²⁴ Ibid., pp. 217, 223.

²⁵ Ibid., p. 218, n. 1.

Oliphant points out, so soon as we begin to generalize, we get a series of propositions each broader than the one before. Each proposition is a generalization which includes a description of the judgment of the case in hand, in the light of the facts, and something more. Which shall we take as the "rule" of the case? For it is obvious that a choice between broader and narrower generalizations must be made.²⁶

Professor Oliphant wisely suggests that the answer to this question is an attitude rather than a statement. Above all, he warns us to avoid super-generalization, deduction from word patterns, and excessive attention to those "essays in rationalization" which lawyers call "opinions."²⁷

In this process of "careful generalization," we may have one of three purposes: (1) Prediction with a greater or less degree of probability, as to how the court will decide a future case if and when a given situation is presented to it. This is a chief function of lawyers in helping their clients discount the future;²⁸ and it is as well a problem for students of constitutional law. We shall later return to the problem. (2) Argument before a court, on behalf of a client's interest, to the end that the court will accept the broader—or the narrower—"rule" as the "decision" of a given precedent. Here the position taken is determined

²⁶ Ibid., p. 228. This choice, be it noted, "is not dictated by logic."

²⁷ Ibid., pp. 222, 224, 225, 229.

²⁸ Cf. Reeves, *La Communauté internationale*, pp. 50-52.

by the interest of the client, though the arguments may relate to social policy—in more or less disguised form. (3) Judgment, as students of the art of government, or as judges, of the desirable rule as tested by its consequences.²⁹ This is the attitude in which we approach the choice we shall presently make of a “rule” for the Myers case.

On the side of prediction, we have a study in probabilities, in which we should pay especial attention to the non-vocal behavior of the judges.³⁰ Yet we can, of course, gain some evidence of their reactions from an analysis of their opinions. In this, however, we must not be misled into the assumption that the generalizations of an opinion can with certainty be made the basis of deduction. For the court always has one eye upon the general situation, and one upon the concrete facts before it. It has no third eye for other concrete situations which it may later raise into exceptions without expressly admitting that it thereby repudiates the super-generalizations of its prior opinions.

On the side of judgment, we engage in reflective thinking, weighing the consequences of competing rules, and selecting that which will lead to the most desirable consequences. This part of our task was presented in Parts I and II. The rule which we shall adopt for the Myers case will be one which will allow ample scope for the future legislation of Congress above advocated. After explaining it, we shall

²⁹ Cf. Oliphant, *op. cit.*, p. 230.

³⁰ *Ibid.*, pp. 227, 229.

proceed to outline a theory of the removal power which is "consistent" both with that rule and with the Constitution, and which at the same time leads to more desirable consequences than the theory set forth in the Myers opinion.

THE "RULE" OF THE MYERS CASE

At the outset we may conveniently classify the statutory limitations which Congress has sought to place upon the power of removal as: 1. the attempt to require the consent of the Senate; and 2. other limitations, such as, limitations upon the grounds upon which an officer may be removed, or prohibition altogether of the removal power. The first limitation, it has often been argued, is impliedly imposed by the Constitution itself. Practice, however, having refuted this theory, it has been claimed that Congress may by law require the Senate's consent. That it may not is what, in our view, the Myers case decided.³¹

Let us list some of the generalizations which we might, by employing Professor Oliphant's method, take as the "rule" of the Myers case. We derive these possible "rules" by noting the two main variable factors implicit in the situation. In the first place, to what class of officers "does" the decision apply? To first-class postmasters only, or all postmasters appointed by the President by and with the advice and consent of the Senate, or all postmasters

³¹ Note in this connection the *text* of the act held unconstitutional in that case.

whom the President appoints, or all executive officers whom the President appoints, or all executive officers of the United States? ³² In the second place, with reference to the class selected from the above, what classes of statutory limitations "does" the Myers decision invalidate? Those only which require senatorial consent to removals, or all which require participation or initiation by Congress, or all also which limit removal to certain causes, after notice and a hearing, or which go further and prohibit altogether removal by the President?

From the substitution of constants for each of these variables, we derive a series of "rules," after the manner described by Professor Oliphant, each of which is a generalized description of the judgment in the light of the facts, yet each of which for that very reason goes beyond the particular facts of the case. We may list the following possible rules, in ascending order, beginning with the narrowest generalization:

1. Congress may not make the President's power of removal of first class postmasters appointed with the consent of the Senate depend upon such consent.

2. Congress may not make the President's power of removal of first class postmasters whom he appoints (whether with or without the Senate's consent) depend upon such consent.

3. Congress may not prohibit nor in any way restrict the President's power to remove first class

³² See note 11 above.

postmasters appointed with the consent of the Senate.

4. Congress may not prohibit nor in any way restrict the President's power to remove first class postmasters whom he appoints (whether with or without the Senate's consent).

5. Same as 1, except that the class of officers "first, second and third class postmasters" is substituted for the class "first class postmasters."

6. Same as 1, except that the general class "postmasters" is substituted for "first class postmasters."

7. Same as 2, except for a substitution like that in 5.

8. Same as 2, except for the substitution suggested in 6.

9. Same as 1, except that for "first class postmasters" is substituted "inferior officers."

10. Same as 2, except for the substitution suggested in 9.

11, 12, 13. Same as 3, except that for "first-class postmasters" will be substituted, successively "first, second and third class postmasters," the general class "postmasters," and "inferior officers."

14, 15, 16. Same as 4, except for the successive substitutions suggested in 11, 12, 13.

17. Congress may not make the President's power of removal of any executive officers of the United States appointed by him with the advice and consent of the Senate depend upon the Senate's consent.

18. Congress may not make the President's power of removal of any executive officers of the United States whom he appoints (with or without the consent of the Senate) depend upon the Senate's consent.

19. Congress may neither prohibit nor in any way restrict the President's power of removal of any executive officers of the United States whom he appoints with the advice and consent of the Senate.

20. Congress may neither prohibit nor in any way restrict the President's power of removal of any executive officer of the United States whom he appoints (with or without the advice and consent of the Senate).

21. Congress may not make the President's power to remove all executive officers of the United States depend in any case upon the advice and consent of the Senate.

22. Congress may not prohibit nor in any way restrict the President's power to remove all executive officers of the United States.

All of these generalizations—and others that might be added—include the facts of the Myers case. But not all are equally acceptable. In the first place, that case dealt with one particular sort of restriction only: the requirement of the Senate's consent. The Chief Justice's references to other sorts of limitation were, by the test set up by James C. Carter, mere *dicta*. This eliminates at once several of the "rules."

In the second place, there is no basis either in the Constitution or in expediency for drawing a distinction which will confine the prohibition, as to this type of restrictions, to first class postmasters, or to first, second and third class postmasters, or to all postmasters, or even to all inferior officers. We thereby eliminate most of the remaining "rules."

There remain only 17, 18, and 19. The Chief Justice himself did not claim that the case extends to officers the appointment of whom is vested in the President alone, though he strongly hinted at his opinion on the matter. And certainly the extension of the case to make it read, as Professor Corwin expressly does,³³ that Congress may not restrict the power of the President, deducible from his "executive power," to remove at pleasure even officers appointed by the heads of departments, whose removal by the said heads may, under the Perkins case,³⁴ be restricted by Congress, is contrary to the express statement of the opinion itself.

Therefore, the rule of the Myers case which we select is 17:

Congress may not make the President's power of removal of any executive officer whom he appoints with the advice and consent of the Senate depend upon the Senate's consent.

This rule, as will appear, does not necessarily prevent Congress from limiting the President in other

³³ See note 11 above. Professor Corwin merely says this follows from the Chief Justice's premises, but he rejects those premises.

³⁴ United States v. Perkins (116 U. S. 143).

ways in the removal of certain classes of officers. Nor does it conflict with our conclusions as to expediency. The important desideratum is that Congress shall have power, with reference to certain classes of officers, to guarantee independence of tenure. The requirement that the Senate's consent be obtained for the removal of such officers might check political pressure from the President, or it might not. In the case of ordinary administration, it would probably hamper efficient administration and divide presidential responsibility; and in the case of boards and commissions it would add the control of one political body to check that of another. The desired end of independence of tenure can better be secured by means which we shall show to be still possible.

In justification of our limitation of the Myers case to the "rule" set forth above, we may first cite the opinion set forth by Solicitor General Beck in his "Brief for the United States on Reargument":³⁵

II. THE QUESTION IN ITS NARROWER ASPECTS

In limine, I stress the point that it may not be necessary in the instant case to determine the broader aspects of this important question, for the statute under consideration can be held unconstitutional without assuming the absolute power of the President to remove any executive officer.

. . . . When Congress provides that the President may not remove except with the concurrence of the Senate, (that

³⁵ Senate Doc. 174, 69th Cong., 2d sess., pp. 69-71.

is, that the incumbent shall hold office during the pleasure of the Senate), such an act does not prescribe qualifications nor enact conditions to be deemed sufficient for removal. It does not create an office, abolish one, nor limit the duration thereof. *It takes from the President a part of his constitutional power and divides it with the Senate.*

Take, for example, a statute which provides that a postmaster should be removed for inefficiency or dishonesty, or that he should not be removed except for inefficiency or dishonesty.

The first statute could probably be reconciled with the Constitution. It is a declaration of public policy and prescribes a standard of service.

The second statute would be of very doubtful constitutionality, for it deprives the President of the power of removal for any other cause than inefficiency or dishonesty.

I can, however, *arguendo*, concede that each of these statutes could be reconciled with the Constitution, for each simply prescribes a legislative standard and defines a public policy in respect to the appointment and causes of removal, and leaves to the President the Executive function of applying the standard in the administration of the executive department. As he determines whether the incumbent has been either inefficient or dishonest, his Executive function, while to some extent restricted (especially in the second act), nevertheless remains.

A very different question, however, is present in the instant case, where no legislative standard is prescribed and no general policy laid down except that the President may not exercise his Executive function of removal except with the consent of the Senate.

This necessarily associates the Senate with the President in the exercise of a purely Executive function. Such a law does not regulate the power of removal. It asserts a right to

exercise it. It differs, *toto caelo*, from the two imaginary statutes which I have cited for the purposes of illustration.

Hitherto it has been assumed in the discussion of this question that there is no middle ground between the *absolute* power of the President to remove and the *absolute* power of the Congress to control the right of removal. The illustrations that I have given suggest that there may be a middle ground. . . .

Whether the middle ground exists need not be decided in this case, for the law now under consideration simply asserts an unqualified right of the Senate to participate in the Executive function of removal.

Such a law is not the declaration of a legislative policy. It is a redistribution of the powers of government. . . .

If this "middle ground" interpretation of the Constitution does not commend itself to the court, then the broader question . . . confronts the court, which must then consider whether the power of removal is a constitutional prerogative of the President and, as such, can not be regulated by Congress. . . .

I repeat that, for the purpose of the instant case, it is not important to the Government which of the two theories of the President's power this court may take; for in either case this statute stands condemned, as it prescribes no legislative standard but simply assumes the right of Congress to participate with the President in the executive power of removal.

The same tendency to narrow the application of the case to the judgment in the light of the facts is seen in a statement issued by the Solicitor General soon after the Myers opinion was handed down. He said:³⁰

³⁰ New York Times, November 7, 1926. Quoted in Willoughby on the Constitution, 2d ed., 1929, III, § 1000.

Moreover, the decision does not decide whether or not there may not be a class of officers who are not in strictness executive officers. For example, the Federal Trade Commission is chiefly a fact-finding commission, to aid Congress in formulating legislation. The Interstate Commerce Commission is a fact-finding commission which discharges the so-called legislative duty of imposing reasonable rates upon carriers. The Comptroller General is regarded as the special representative of Congress in seeing that its appropriations are faithfully disbursed. Can the President remove such *quasi*-legislative officials? This [Myers] decision is not conclusive upon this point, and properly so; for no case of this character was before the court.

CHAPTER VI

FACTORS IN THE LEGAL PROBLEM

We have now shown that, as an authoritative precedent, the decision in the Myers case gives a final answer to only one of the questions which relate to tenure of office under the Constitution. That decision was in line with the congressional conclusion of 1789 that the Senate should not share in the power of removal. It held that an act of Congress purporting to give such share in removals to the Senate was invalid. But there are obviously other ways in which Congress might legislate as to tenure. It might seek to make certain officers irremovable, either during a fixed term or during good behavior. Or, it might prescribe the grounds upon which alone the President may remove, as well as the mode of procedure necessary to make an act of removal valid. The latter might prove to be a more or less important safeguard against removals for other causes than those prescribed in the statutes.

These sorts of tenure of office acts not having been passed upon in the Myers case, it remains for us to inquire whether they might be held constitutional. Is there any "necessity" to accept premises, such as those of the Myers opinion, which will lead us to conclude that these types of statutes also are invalid? Is there any "inescapable" answer to our

question in the text of the fundamental law? Does the historic debate on removals in the first Congress give us a "conclusive" answer? Are there any judicial precedents other than the Myers case which preclude the reopening of this issue along the lines suggested?

In this chapter we shall examine these several factors in the legal situation. By so doing we shall find that the question before us is still an open one. We shall find that we cannot tag any answer as a "necessary conclusion." Hence, we shall be forced to a choice. This choice we shall make upon the basis of public policy. What that policy is in the instant case has been made clear in Parts I and II. To attain the ends therein set forth as socially expedient, we shall conclude our constitutional study by outlining in the final chapter a constitutional theory of the power of removal, or, in other terms, a theory of tenure of office under the Constitution. We shall not claim that this is the "only possible" theory; what we shall do is simply to state our conclusions as to public policy in terms of "constitutional interpretation." For, under our existing legal habits of thought, such conclusions, to be acceptable, must be expressed in terms of inferences drawn from the Constitution. Other inferences, we shall see, might be drawn from the document; but we shall select premises which may plausibly be read into the Constitution, our selection to be made on the basis of the expediency of the conclusions which are

deducible therefrom. Our "constitutional theory" will thus consciously be a mode of stating our views of expediency in legal language. Logically, this is all that, in a situation such as this, anybody can do. Yet, as we shall show, judges talk as if, and seem often to believe that, what they do is something much more "mechanical."¹ They think their deductions are "reasons" for decisions when, logically, they are the forms of stating conclusions² already arrived at. In such a situation, it is much better to be conscious of the grounds of the choice of the conclusions.³

The Text of the Constitution. If the Constitution itself gave an "unequivocal" answer to the question whether Congress could restrict the power of removal, we should need to go no further. But this statement is misleading in that it implies that language symbols can be entirely "unequivocal."⁴ Even if the text dealt, in explicit terms, with the subject, there would still, no doubt, be the possibility of raising questions of so-called "interpretation." Or, more accurately, there would still be the probability that some situation—say the tenure of the Comptroller General—would arise where the question

¹ See the naïve view quoted in Cook, "Scientific Method and the Law," *Johns Hopkins Alumni Magazine*, March, 1927, at pp. 228-229.

² *Ibid.*, pp. 230-232.

³ See Holmes, "Path of the Law," in *Collected Legal Papers*, pp. 181, 184, 185.

⁴ Ogden and Richards, *The Meaning of Meaning*, passim. These writers emphasize a truth that most lawyers lose sight of; namely, that all definitions are *ad hoc*: p. 111.

might plausibly be raised whether the terms of the text "included" this special situation. When we say that, in such an event, the courts give an "authoritative interpretation" of a text, we really are describing the result of reflective thinking whereby the courts extend, or refuse to extend, the meaning of the concepts in question to include the new situation.

But, in regard to the question of removal from office, other than upon conviction after impeachment, the Constitution is not even ambiguous. It resembles the Sphinx rather than the Oracle of Apollo. While the Myers case was pending, Professor Lindsay Rogers wrote: "The Court will not have to find out what the law is, because the law does not exist. The Court must determine what the Constitution would have said on such a subject if the Constitution had not been silent."⁵ So far as that document is concerned, therefore, we are left purely to inference. It is a matter of historical record, as well as a conclusion forced upon us by a consideration of the nature of language symbols and of the "logic" of "documentary interpretation," that different persons may infer different conclusions from the text of the Constitution as to the power of removal.⁶ These differences began with the split

⁵ *The American Senate*, p. 35.

⁶ For a striking illustration of this, see how the "framers" who were present in the first Congress differed in their inferences: Thach, *The Creation of the Presidency*, chap. VI. Compare also the majority and dissenting opinions in *Myers v. United States* (272 U. S. 52).

among the members of the first session of the first Congress who had been members of the Philadelphia Convention of two years before.⁷ They have continued to the present time. In the complete absence of explicit language dealing with the subject, the leeway for varying inferences is wider than usual.

In drawing such inferences, Mr. Justice Holmes is neither more nor less "logical" than Mr. Chief Justice Taft. Their differences grow solely out of the fact that they read into the silent text different premises. To draw inferences from this silence, it is absolutely necessary to assume, tacitly or consciously, certain premises which are thus read into the clauses which are considered "relevant." Since these two men differ as to which clauses are "relevant," and as to the "meaning" of those clauses selected as relevant, it would be astonishing if they did arrive at the same conclusion. Only if one of them reasoned in an illogical fashion, would this identity of conclusions be possible!

Now if it depends upon what we read into the depths of Constitution's silence as to what we draw out of it, then how can one man's conclusions be more "logical" than those of another? This would be possible if one of them were "inspired" as an interpreter. But there is no doctrine that our judges are "infallible" in the sense of the Catholic doctrine of "papal infallibility." However, it is possible to select a group of men whose conclusions,

⁷ See note 6 above.

while not "infallible," are yet habitually accepted as "authoritative." For American constitutional law, this group is the Supreme Court when deciding the specific issue of a given case. Unless and until this Court so decides the issues which we have raised, then there will be no "meaning" which is "necessarily" to be read into the text of the Constitution. As yet, that text can give us no answer, except as we bring to it additional data in the form of "extrinsic evidence" or conclusions on public policy.

Principles Now Firmly Established. At this point we may conveniently set forth the principles which practice and interpretation have so firmly established that there is very little likelihood that they will ever be seriously questioned.

The first is that, at least in the absence of legislative provisions to the contrary, the President has directly from the Constitution complete authority to remove at pleasure all officers whom he appoints, federal judges, of course, excepted.

The second is that, in performing this function, the President need not consult the Senate. The President acting alone exercises this power, and the Senate has no constitutional claim to participate.

These first two principles have been the outgrowth of the "legislative decision" of 1789, which has been followed in practice ever since, and assumed by the Supreme Court in several cases. The result of the grand debate on the power of removal which

took place in the first Congress was the enactment of statutes recognizing that the President—acting alone—has the power, not by legislative grant, but by inference from the Constitution, to remove at pleasure department heads. Opinion in the debate had not been unanimous by any means. There had been set forth four different theories of constitutional interpretation.⁸ But the one that won, by being embodied in the acts creative of the three departments then established, was “that the President possessed the sole power by virtue of the Constitution itself.”⁹ For these acts, instead of authorizing the President to remove such department heads, provided for the situation that would arise whenever he should exercise his right to remove them. These words were deliberately chosen to express a recognition of a constitutional power, and one in the exercise of which the Senate was held not to be included.¹⁰

This interpretation became the accepted practice. In the administration of President Jackson the implications of the power of removal as involving the correlative power of administrative supervision were clearly brought out. In order to strengthen the state banks, the President determined to remove government funds from the National Bank, with which he was “at war,” and to deposit them with

⁸ Thach, *op. cit.*, p. 44.

⁹ *Ibid.*

¹⁰ Thach, *op. cit.*, chap. VI, gives a vivid and illuminating account of this vote.

the former institutions. When Secretary of the Treasury McLane refused to order the removal, the President made Duane Secretary of the Treasury, shifting McLane to the State Department. When Duane likewise proved intractable, and refused to resign, Jackson removed him from office and appointed Taney, who ordered future deposits to be made in the state banks.¹¹ These incidents led to congressional debates in which the issues were again discussed,¹² but Congress took no decisive action, except that the Senate censured the President's action and refused to confirm Taney's nomination. The censure was later expunged from the records.

Practice has firmly established these principles. One or both were assumed in earlier Supreme Court decisions. Thus in *Parsons v. United States*¹³ the Court held that a statutory limitation of the term of an officer appointed by the President, by and with the advice and consent of the Senate, did not indicate the Congress thereby intended to forbid the President to remove the officer before the expiration of the term. However, when the case arose, the Senate had already confirmed the nomination of the officer's successor. A *dictum* in *ex parte Hennen*, which is considered below, accepted the theory of the sole power of removal, without the consent of the Senate.

¹¹ Latané, *History of the United States*, pp. 281-283.

¹² See below, this chapter, quotations from speeches of Clay, Calhoun and Webster.

¹³ 167 U. S. 324.

Again, in *Shurtleff v. United States*,¹⁴ the Court construed a clause authorizing presidential removal for specified causes as not intending to restrict his pre-existing power to remove for other causes. Both decisions proceeded upon the assumption that, prior to the passage of the statute involved, the President had the power to remove; and, at least in the *Shurtleff* case, the Court gave a strained construction to the law, a construction that made it almost meaningless, in order to avoid the direct issue whether Congress could restrict the President. But however these earlier cases be interpreted, the second principle is certainly included in the third.

The third principle is that Congress may not by statute require the President to consult the Senate in exercising this power of removal. Presumably, also, Congress cannot take to itself the exercise of the power. This principle was first brought into issue by the Tenure of Office Acts of the Johnson administration.¹⁵ Then for the first time Congress tried to require by statute the consent of the Senate before presidential removals should become effective. This issue figured in the impeachment of President Johnson;¹⁶ and later led to a sharp fight between President Cleveland and the Senate.¹⁷ The

¹⁴ 189 U. S. 311. The court said that removal for one of the specified causes would probably have to be preceded by a hearing, but that removal without a hearing was presumably for a cause other than one of those enumerated in the statute.

¹⁵ Especially 14 Stat. at L. 430, chap. 154.

¹⁶ Dewitt, *The Impeachment and Trial of Andrew Johnson*.

¹⁷ See Cleveland, *Presidential Problems*, chap. I.

constitutionality of such acts was always regarded as doubtful; and the most important of them was repealed. One that remained on the books¹⁸ was brought before the Court in the Myers Case.¹⁹ Then for the first time the Court passed upon this delicate question; and its decision finally established the third principle set forth above.²⁰

Possibly a fourth principle is that in case Congress legislates in regard to removals, the courts will not interpret its acts as limitations upon this presidential power where the language is open to other interpretation. This seems to be an implication of the Shurtleff case.²¹ The Court held in that case that the statutory provision for removal for specific causes did not prevent removal without hearing for other causes. This absurd result was the excuse for avoiding the issue with which we are primarily concerned in this treatise. It would seem that, so long as the case is not overruled, it requires plain language—very plain language—for Congress to restrict, if it may restrict at all, the President's power of removal. Congress would have to say explicitly that removal must be for the listed causes and for these only before the words of the statute would have any practical effect at all.

A fifth principle seems to be that the act by which Congress vests the power of appointment of inferior

¹⁸ 19 Stat. at L. 80-81.

¹⁹ 272 U. S. 52.

²⁰ See chap. V above.

²¹ 189 U. S. 311.

officers in department heads or the courts of law implies, in the absence of other provision, a power of removal in such appointing authority. This was decided in the case of *ex parte Hennen*.²² The judge of the district court of Louisiana had appointed a clerk of the court under authority of Congress; and, there being no statutory provision concerning the removal of such clerks of court, had removed him. The Supreme Court declared the act of removal valid. This presumably applies also to department heads, as the next case to be considered indicates.

This case—United States v. Perkins²³—established the principle which we may list as number six. This is, that in such cases, at least with reference to department heads so vested with the appointment of inferior officers, Congress may regulate the exercise of the power of removal. At least, this is a reasonable “rule” to adopt for the case, as well as the “rule” which the Myers opinion ascribed to it. Congress had by law provided that no officer in the naval service in time of peace could be removed except after a court martial. A naval cadet engineer having been dismissed by the Secretary of the Navy without a court martial, the Court held the removal illegal. The basis of the decision was that, by vesting the power to appoint such inferior

²² 13 Pet. 230.

²³ 163 U. S. 625. The Court was not called upon to decide whether the fact that Congress may vest the appointment of inferior officers in department heads gives it a power to regulate tenure even while it leaves appointment to President and Senate.

officers in the department head, Congress acquired a power to restrict his removal of such officers "as it deems best for the public interest." Whether Congress could restrict the power of courts in removing officers appointed by them, especially officers performing court functions, is another question.

Precedents and the Questions Still Undecided. Such are the only significant precedents of the highest court. It is clear that they have decided certain fairly definable "principles" which will, we think, be generally accepted. But the point is that there remain questions—especially one all-important question—upon which none of the decisions²⁴ of the Court has directly passed judgment. Thus it has been suggested that, even where Congress by statute regulates the removal of officers appointed by department heads, when such heads do the removing, the President himself has, under his executive power as defined in the Myers opinion, a separate and illimitable power of removal.²⁵ However, the opinion in that case gave no hint of any such presidential power. Whether or not it is implicit in the premises of that opinion is for us immaterial; for we shall reject several of those premises.

But the most important question that has not been judicially settled is this: may Congress by statute regulate the conditions of tenure, and the causes and mode of removal, of non-inferior officers, and of

²⁴ As distinguished from mere *dicta* in the opinions.

²⁵ See Corwin, *The President's Removal Power*, p. 7.

those inferior officers whose appointment it leaves to the President and Senate, or which it vests in the President alone?

We have already noted the silence of the Constitution on this point. The Myers opinion infers that Congress has no such power; but we saw in the last chapter that these statements are *dicta*. In short, none of the cases furnishes us the additional data needed to read an answer into the Constitution. There are left two important sources of such additional data: the historical material, and the "reasoning" of the Myers opinion and other essays and debates on the subject.

The "*Legislative Decision*" of 1789. In the opinion of the Court in the Myers case the Chief Justice laid great stress upon the debate on the removal power which took place in the first session of the first Congress, and upon the action that resulted from that debate. But whatever that debate decided, it need not be taken as having decided the question before us. This is all we need prove.

The best account of this debate is that given by Professor Thach in his *Creation of the Presidency*.²⁰ He points out that four different theories were developed in the House. These he describes as follows: "that the major executive officers held office on good behavior and were removable only by

²⁰ This is a monograph in the *Johns Hopkins Studies in Historical and Political Science* (1922). It is a scholarly analysis of first rank, and will form the basis of our discussion of the debate of 1789.

impeachment; that the power to remove was incident to the power to appoint, was consequently vested by the Constitution jointly in the President and Senate, and should be left unmentioned in the organization bills, or, if mentioned, should be recognized as possessed jointly; that the power to create offices was complete, and included a right on the part of Congress to vest removal where it chose, which should be the President alone; finally, that the President possessed the sole power by virtue of the Constitution itself."²⁷

In the House sixteen members were constitutional grant men; fourteen may reasonably be classed as legislative grant men.²⁸ There were three Convention members in each group.

The final vote was 29 to 22. The 29 included six Convention members, the 22 two Convention members.²⁹ This vote brought together the constitutional grant and the legislative grant men in a final decision in favor of the constitutional grant theory.³⁰

In the Senate, the tie vote led Vice-President Adams to give the casting vote in favor of the constitutional grant theory.³¹ Of the Convention members, six voted in favor of the bill, four against.³²

²⁷ Thach, *op. cit.*, p. 144.

²⁸ Ibid., p. 154. See, for Boudinot, *ibid.*, note 31. The position of some seems merely a matter of inference.

²⁹ Ibid., pp. 154-155.

³⁰ Ibid., pp. 149, 151, 154.

³¹ *Macclay's Journal*, pp. 113-114.

³² Thach, *op. cit.*, pp. 157-158.

Thus in the final analysis twelve of the eighteen Convention members voted for the constitutional grant idea.³³

These figures are, however, misleading. It would be more correct to say that nine of the eighteen definitely thought the constitutional grant theory the proper construction to be placed on the Constitution. To see how this is so, we must consider the parliamentary strategy of Benson, a strategy which lined up the legislative grant men behind the constitutional grant theory. Dr. Thach tells the story: the original bill provided that the foreign secretary should be "removable by the President," a phraseology that seemed to be based on the legislative grant theory, but was ambiguous. During the discussion of this bill, Representative Benson gave notice of an amendment to read that the chief clerk should take charge of the office "whenever the said principal officer shall be removed from office by the President of the United States, or in any other case of vacancy." His idea was to strike out the words "to be removable by the President" after the adoption of this amendment. The legislative grant men could thus vote for the amendment without formally abandoning their position. Then on the later move to strike out, the opponents of the idea of presidential removals would be in a dilemma whichever way they voted. By voting to strike out they would support the constitutional grant idea. By voting

³³ Ibid., p. 158.

may they would support the legislative grant idea. Both motions carried, and the final bill clearly expressed the constitutional grant theory.³⁴ Apparently some at least of the legislative grant men shifted their position, by way of compromise, rather than support either the tenure during good behavior theory or the senatorial participation theory. Three of these were Convention members,³⁵ and their names are properly to be subtracted from the twelve Convention members who voted finally for the bill. It is reasonable to conclude that they preferred to have the President alone remove;³⁶ but there is no reason to believe they changed their views on the power of Congress to regulate tenure.

*It is thus not unfair to say that as evidence of the "intent" of the framers of 1787, the debate showed them equally divided between those who favored the constitutional grant idea and those who did not. Of the latter, some were senatorial participation adherents.*³⁷

The Chief Justice utterly ignores the fact that the views of "Mr. Madison and his associates," upon which he relies, were held by only half the ex-Convention members. But this is not the whole story. Madison himself, often called the "father of the Constitution," shifted during the course of the debate from the legislative grant to the constitutional

³⁴ Ibid., pp. 153-154.

³⁵ Ibid., p. 154.

³⁶ Ibid., pp. 148-149, 159-162.

³⁷ Ibid., pp. 146, 154-155. There were two of this view among the ex-members of the Convention in the House.

grant camp!³⁸ Furthermore, the bill would not have passed the Senate at all had not Dalton and Bassett "recanted."³⁹ The latter had been a member of the Philadelphia Convention. The uncertainty felt by members is indicated by the fact that Butler, who voted against the constitutional grant theory in the Senate, had been in favor of it until he heard Ellsworth's arguments in support of the idea.⁴⁰ Thus one Convention member "converted" another to opposition by his manner of advocacy!

After it had been settled that heads of departments should hold during pleasure, Madison suggested that the Comptroller, as an officer whose functions partook of a judicial as well as executive quality, have a limited term, but be removable during that term by the President. His idea was to make him dependent all around, in the interest of the individual. Apparently Madison and others considered this a special limitation upon the power of removal as they had construed it. Yet if this is so, the "legislative decision" has since been partially departed from; the terms of many officers other than department heads have been fixed,⁴¹ and this power of Congress is undoubted.⁴² The dissenting opinion of Mr. Justice MacReynolds in the Myers case called this a limitation also: the act of 1820 which fixed

³⁸ Ibid., pp. 151-153.

³⁹ *MacLay's Journal*, pp. 112-113.

⁴⁰ Ibid., p. 110.

⁴¹ 1 Stat. at L. 87, chap. 20; 3 Stat. at L. 582, chap. 102.

⁴² See the Parsons case (167 U. S. 324).

four year terms for many officers, is, it said, a removal by direct legislation.

The matter was dropped probably because of a disinclination to re-open the issue in any of its aspects. Yet it is not without significance that Stone said:

As the Comptroller was an inferior officer, his appointment might be vested in the President by the Legislature; but, according to the determination which had already taken place, it did not necessarily follow that he should have the power of dismissal.

Misunderstanding Madison's suggestion, apparently, Stone also said "he did not know whether the office should be held during good behavior, as the gentleman proposed. . . . But he thought all officers, except judges, should hold their offices during pleasure."

Smith, of South Carolina, "approved the idea of having the Comptroller appointed for a limited time, but thought during that time he ought to be independent of the Executive, in order that he might not be influenced by that branch of the Government in his decisions."⁴³

Constitutional Practice. Congress long acquiesced in the constitutional grant idea, and long refrained from attempting to regulate the power of removal. But in 1835 the removals of President Jackson led Clay, Calhoun and Webster to assert on the floor of the Senate that Congress may regulate it.

⁴³ Annals of Congress, I, cols. 635-639.

In his speech of February 18, 1835,⁴⁴ Clay repudiated the idea that the opening sentence of Article II of the Constitution is a grant of general executive power:

In neither case, does the preliminary clause convey any power; but the powers of the several departments are to be sought for in subsequent provisions. The legislative powers granted by the constitution are to be vested, how? In a Congress. What powers? Those which are enumerated. The executive power is to be vested, how? In a council or in several? No, in a President of the United States of America. What executive power? That which is possessed by any chief magistrate in any country, or that which speculative writers attribute to the executive head? No such thing. That power, and that only, which the constitution subsequently assigns to the chief magistrate.

Clay continued:

There is much force in the argument which attaches the power of dismission to the President and Senate conjointly, as the appointing power. But I think we must look for it to a broader and higher source—the legislative department. The duty of appointment may be performed under a law which enacts the mode of dismission. This is the case in the post-office department, the post-master general being invested with both the power of appointment and of dismission. But they are not necessarily allied, and the law may separate them; and assign to one functionary the right to appoint, and to a different one the right to dismiss. Examples of such a separation may be found in the State governments.

⁴⁴ Clay: *Life and Speeches* (Phila., 1853), II, 269 ff. The significance of the opinions of Clay, Calhoun and Webster is not wholly destroyed by the fact that even Clay did not insist upon legislation in control of the removal power.

It is the legislative authority which creates the office, defines its duties, and may prescribe its duration. . . . The office, coming into existence by the will of Congress, the same will may provide how, and in what manner, the office and the officer shall both cease to exist. It may direct the conditions on which he shall hold the office, and when and how he shall be dismissed. . . . But the constitution has not fixed the tenure of any subordinate offices, and therefore Congress may supply the omission. It would be unreasonable to contend that, although Congress, in pursuit of the public good, brings the office and the officer into being, and assigns their purposes, yet the President has control over the officer which Congress cannot reach or regulate; and this control in virtue of some vague and undefined implied executive power which the friends of executive supremacy are totally unable to attach to any specific clause in the constitution.

It has been contended, with great ability, that under the clause of the constitution which declares that Congress shall have power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and *all others* vested by this Constitution in the government of the United States, or in any department or officer thereof," Congress is the sole depository of implied powers, and that no other department or officer of the government possesses any. If this argument be correct, there is an end of the controversy. But if the power of dismissal be incident to the legislative department, Congress has the clear right to regulate it. And if it belong to any other department of the government, under the cited clause, Congress has the power to legislate upon the subject, and may regulate it, although it cannot divest the department altogether of the right. . . .

But it will be argued that if the summary process of dismissal be expedient in some cases, why take it away altogether? The bill under consideration does not disturb the power. By the usage of the government, not I think by the

constitution, the President practically possesses the power to dismiss those who are unworthy of holding these offices. . . . The principal object of the bill is to require the President, in case of dismission, to communicate the reasons which have induced him to dismiss the officer. . . . And yet this mild regulation of the power is opposed by the friends of the administration!

But, Mr. President, although the bill is, I think, right in principle, it does not seem to me to go far enough. . . . It will be some, but not sufficient restraint against abuses. I have, therefore, prepared an amendment. . . . By this amendment [which he was later induced not to urge at that time], as to all offices created by law, with certain exceptions, the power at present exercised is made a suspensory power. . . .

It may be said that there are certain great officers, heads of departments and foreign ministers, between whom and the President entire confidence should exist. This is admitted. But surely if the President removes any of them the people ought to know the cause. The amendment, however, does not reach those classes of officers. And supposing, as I do, that the legislative authority is competent to regulate the exercise of the power of dismission, there can be no just cause to apprehend that it will fail to make such modifications and exceptions as may be called for by the public interest.

Clay spoke at length of the precedent of 1789. He said the confidence reposed in President Washington had great influence in establishing it; that Madison's argument was the most unconvincing he had ever seen from his pen; and that it had never been reviewed because there was felt to be a need for removals by a means short of impeachment, and because the power had not been abused until the Jackson administration. He also pointed out the

different construction given in the states, despite the existence in the Kentucky constitution of a faithful execution clause.

Calhoun ⁴⁵ explained how his examination of the question had led him to reverse his earlier assumptions, based upon the fact that the decision of 1789 had never been disturbed:

If the power to dismiss is possessed by the Executive, he must hold it in one of two modes: either by an express grant of the power by the constitution, or as a power necessary and proper to execute some power expressly granted by that instrument. . . . If it exists in that [the latter] character, it belongs to Congress and not to the Executive. . . . Hear what that sacred instrument says [quotes necessary and proper clause]. Mark the fulness of the expression. Congress shall have power to make all laws not only to carry into effect the powers expressly delegated to itself, but those delegated to the Government, or any department or office thereof. . . . It follows, of course, to whatever express grant of power to the Executive the power of dismissal may be supposed to attach, whether to that of seeing the law faithfully executed, or to the still more comprehensive grant, as contended for by some, vesting executive powers in the President, the mere fact that it is a power appurtenant to another power, and necessary to carry it into effect, transfers it, by the provisions of the constitution cited, from the Executive to Congress, and places it under the control of Congress, to be regulated in the manner which it may judge best. . . .

Such . . . are the arguments by which I have been forced to conclude that the power of dismissing is not lodged in the President, but is subject to be controlled and regulated by Congress. . . . I have been compelled to the conclusion, in

⁴⁵ Register of Debates in Congress, 23d Cong., 2d sess., pp. 553 ff.

spite of my previous impression. Relying upon the early decision of the question, and the long acquiescence in that decision, I had concluded, without examination, that the decision had not been disturbed because it rested upon principles too clear and strong to admit of doubt.

In his speech of February 16, 1835, Webster said, in part: ⁴⁶

This provision [of a proposed bill] is that, whenever the President removes any of these officers from office, he shall state to the Senate the reasons for such removal. . . .

The bill . . . expressly recognizes and admits the actual existence of the power of removal. . . . I consider it, therefore, a settled point; settled by construction, settled by precedent, settled by the practice of the government, and settled by statute. . . . At the same time, . . . in my deliberate judgment, the original decision was wrong. I cannot but think that those who denied the power in 1789 had the best of the argument; and yet I will not say that I know myself so thoroughly as to affirm that this opinion may not have been produced, in some measure, by that abuse of the power which has been passing before our eyes for several years. . . .

Executive power is not a thing so well known, and so accurately defined, as that the written constitution of a limited government can be supposed to have conferred it in a lump. . . . What model or example had the framers of the Constitution in their minds . . .? Did they mean executive power as known in England, or as known in France, or as known in Russia? Did they take it as defined by Montesquieu by Burlamaqui, or by De Lolme? . . .

I understand the Constitution as saying that "the executive power *herein granted* shall be vested in a President of the United States." . . .

⁴⁶ Works (Boston, 1854), IV, 179 ff.

. . . . I do not, therefore, regard the declaration as being any grant at all. . . . In the one case, as in the other, I think the object was to describe and denominate the department, which should hold, respectively, the legislative and the executive authority. . . .

Especial attention may be called to Webster's argument that if the opening sentence of Article II vests the executive power as a lump in the President, then the express grant of so universally recognized an executive power as the command of the army and navy is rendered redundant:

The very first of the enumerated powers is the command of the army and navy. This, most certainly, is an executive power. And why is it particularly set down and expressed, if any power was intended to be granted under the general words?

Webster continued:

If, then, the power of removal be admitted to be an executive power, still it must be sought for and found among the enumerated executive powers, or fairly implied from some one or more of them. It cannot be implied from the general words. The power of appointment was not left to be so implied. . . .

. . . . Nothing is said in the Constitution about the power of removal, because it is not a separate and distinct power. It is part of the power of appointment, naturally going with it or necessarily resulting from it. The Constitution and laws may separate these powers, it is true. . . . So a statute, in prescribing the tenure of any other officer, may place the officer beyond the reach of the appointing power. But where no other tenure is prescribed, and officers hold their places at will, the will is necessarily the will of the appointing power; because the exercise of the power of appointment at once displaces such officers.

Webster contended that the usual practice had been to associate removals with the appointment of successors, and concluded that the power of removal ought to have been only with the Senate's consent.

Again he said:

But this argument, drawn from the supposed inconvenience of denying an absolute power of removal to the President, suggests still another view of the question. The argument asserts, that it must have been the intention of the framers of the Constitution to confer the power on the President, for the sake of convenience, and as an absolutely necessary power in his hands. Why, then, did they leave their intent doubtful? *Why did they not confer the power in express terms?* Why were they thus totally silent on a point of so much importance?

I have the clearest conviction that they looked to no other mode of displacing an officer than by impeachment, or by the regular appointment of another person to the same place.

The present bill does not disturb the power; but I wish it not to be understood that the power is, even now, beyond the reach of legislation. I believe it to be within the just power of Congress to reverse the decision of 1789. . . .

The regulation of the tenure of office is a common exercise of legislative authority, and the power of Congress in this particular is not at all restrained or limited by anything contained in the Constitution, except in regard to judicial officers. All the rest is left to the ordinary discretion of the legislature. Congress may give to offices which it creates (except those of judges) what duration it pleases. . . . When he comes into the office, he comes into it upon the conditions and restrictions which the law may have attached to it. If Congress were to declare by law that the Attorney-General, or the Secretary of State, should hold his office during good behavior, I am not

aware of any ground on which such a law could be held unconstitutional. A provision of that kind in regard to such officers might be unwise, but I do not perceive that it would transcend the power of Congress While the power of nomination and appointment is left fairly where the Constitution has placed it, I think the whole field of regulation is open to legislative discretion. If a law were to pass, declaring that district attorneys, or collectors of customs, should hold their offices for four years, unless removed on conviction for misbehavior, no one could doubt its constitutional validity; because the legislature is naturally competent to prescribe the tenure of office. And is a reasonable check on the power of removal any thing more than a qualification of the tenure of office?

Webster concluded by saying that the decision of 1789 was erroneous; but that it had been established, and hence it was their duty to act upon it for the time being, at least, without admitting it could never be reversed if necessary.

The Tenure of Office Act of 1867 ⁴⁷ provided that every person holding a civil office by appointment of the President and Senate was entitled to hold such office until a successor should have been in like manner appointed; except that, during a recess of the Senate, when such officer should prove to be guilty of misconduct in office, or crime, or to be incapable, or legally disqualified, in such case and no other, the President might suspend such officer and designate a temporary incumbent. In such case, the President, within twenty days after the Senate next

⁴⁷ 14 Stat. at L. 430, chap. 154.

met, should report such suspension, with the evidence and reasons therefor. If the Senate should concur in the suspension and consent to the removal of the officer, the President might nominate a successor to the Senate. But if the Senate should refuse its consent, the suspended officer should forthwith resume his office. The Act provided even for the department heads, who, by special express provision, were to hold office for the term of the President who appointed them, and for one month thereafter, subject to removal by and with the consent of the Senate, and to suspension, presumably, as in the case of the other officers mentioned above.

The act of April 5, 1869⁴⁸ modified this act by repealing the above sections, and providing instead that every person holding civil office by appointment of the President and Senate should be entitled to hold office during the term for which he should have been appointed unless sooner removed by the consent of the Senate, or by the appointment by consent of the Senate of a successor; except that during any recess of the Senate, the President might, in his discretion, suspend such officer until the end of the next session of the Senate, and designate an incumbent, in the meanwhile. It should be the duty of the President, within thirty days after the commencement of each session of the Senate, to nominate to all vacancies which existed at the meeting of the Senate, whether temporarily filled or not, and also

⁴⁸ 16 Stat. at L. 6-7, chap. 10.

in the place of all suspended officers. If the Senate should, during such session, refuse to consent to an appointment in place of any suspended officer, then, and not otherwise, the President should nominate another person as soon as practicable to said session of the Senate. The 1869 law thus allowed a suspension that amounted to removal in the discretion of the President, and did not provide for reinstatement of the suspended officer, in case the Senate refused to consent to the appointment of a successor. The President was, however, still to suspend only during the recess of the Senate, while during a session of the Senate, removal clearly had to be with the Senate's consent. This act was not repealed until 1887.⁴⁹ For twenty years, therefore, the Senate tried to limit the President's power of removal even of cabinet officers. Furthermore, in 1872 ⁵⁰ it was provided that the Postmaster General, as well as certain classes of postmasters, be removed by the President with the consent of the Senate. This law, reenacted in 1876,⁵¹ remained in force until 1926, when the Myers decision held it invalid. Thus Congress asserted some power of control for nearly sixty years. Nor is the significance of this assertion of control entirely destroyed, from the standpoint of the practice and attitude of Congress, by the fact that the form of control selected has been held invalid.

⁴⁹ 24 Stat. at L. 500, chap. 353.

⁵⁰ 17 Stat. at L. 284.

⁵¹ 19 Stat. at L. 80.

Furthermore, in recent years Congress has begun to specify "causes" for removals.⁵² An act of this sort was held in the Shurtleff case⁵³ not to limit the President's power to remove for other causes. This case was decided in 1903, and in 1908 the statute involved in the case⁵⁴ was amended to provide not merely for removal for certain causes, but for these only: general appraisers, it said, should "hold office during good behavior but may, after hearing, be removed . . . for the following causes and no other: neglect of duty, malfeasance in office or inefficiency."⁵⁵ In this way Congress deliberately asserted its right, by plain language, to restrict removals to certain causes after hearing, and thus to escape the effects of the Shurtleff decision. This is not congressional acquiescence in an illimitable power of removal. Nor is the fact that Presidents have signed various bills making such provisions consistent with the thesis that Presidents have claimed an unlimited power of removal in all respects. Professor Corwin has, on the other hand, well suggested that presidential propaganda in favor of repeal of the Tenure of Office Act has advertised the views of the removal power which Presidents have naturally tended to take.⁵⁶

⁵² See Rogers, *The American Senate*, Appendix A.

⁵³ 189 U. S. 311.

⁵⁴ 26 Stat. at L. 136, sec. 12.

⁵⁵ 35 Stat. at L. 406, sec. 3.

⁵⁶ *The President's Removal Power*, p. 33. The facts of the McAllister case (141 U. S. 174) show President Cleveland conforming to the Tenure of Office Act.

It is quite true that since the Shurtleff decision we must suppose that Congress has not intended statutes authorizing removal for causes, but not for such causes only, to be more than moral limitations upon the President. Yet other statutes which are strictly in point may be cited. Congress has, in plain language, made the members of the Court of Claims,⁵⁷ those of the Board of Tax Appeals,⁵⁸ and those of the Railroad Labor Board,⁵⁹ removable for certain causes only.

The Supreme Court has never acquiesced in the illimitable presidential power of removal. It has at the most recognized that the President alone has the power of removal, by inference from the Constitution, over his appointees; a power with which the Senate, a legislative body, may not even by statute be associated.⁶⁰ For the rest, it went out of its way to evade the direct issue of the power of Congress to control removals, in all cases before the Myers case; and in that case it held, strictly speaking, no more than what has just been described. By the *dicta* of this decision we are not bound.

Conclusions on the Historical Data. The assumption is commonly made that a "fact" is an objective thing which the investigator merely "dis-

⁵⁷ 40 Stat. at L. 1157, sec. 4, gives tenure "during good behavior."

⁵⁸ 43 Stat. at L. 336, 337, sec. 900.

⁵⁹ 41 Stat. at L. 470, secs. 306, 307.

⁶⁰ See chap. V above, on Myers decision. See, however, our discussion of *Wallace v. United States* (257 U. S. 541) in note 159b of the next chapter.

covers "; that there is such a process as arriving at the " correct " picture by merely fitting together the pieces of the historical puzzle. This analogy is, however, fundamentally false.⁶¹ Historical facts are mere isolated statements of events that have no meaning for any human purpose until interpreted. Historical research tells us merely that Madison used such and such words in the grand debate, that he voted aye or no on such and such a motion, etc. Any statement of the significance of these past events must be made from an approach which is relative to some definite purpose, and made with certain postulates in mind. The account that is given necessarily involves a weighting of past events which is conditioned by the purpose of the inquiry and the postulates which are brought to it. A " purely " historical account would be a mere catalogue of unrelated past happenings. The historian himself interprets the data in relating them in a connected account. The Court must still further interpret them by weighting them relative to their legal significance. It is only then that they have " meaning " for the purpose of constitutional construction.⁶² This judicial weighting is necessarily and properly dependent upon the other factors which the particular judge sees in the legal and logical situation. This is why Mr. Chief Justice Taft drew from the " history of practice " conclusions different from those of Justices McReynolds

⁶¹ Cf. Barry, *The Scientific Habit of Thought*, chap. II.

⁶² Dewey, *Essays in Experiment and Logic*, pp. 242-244.

and Brandeis. It is extremely important that we be conscious of this choice involved in historical interpretation, if we are to give historical data their proper place in the judicial process.

It was not necessary, therefore, for the preceding section to give an exhaustive catalogue of past events relative to our problem. Since "the facts" never "speak for themselves," and since relative to a given use of "history," the very idea of "objectivity" is meaningless, it was enough to give in that section the data which we shall now use to refute the claim that "contemporaneous construction," and "longstanding practice from a time contemporaneous with the adoption of the Constitution,"⁶³ furnish a "meaning" behind which, relative to our problem, a court may not go.

Our frank object is to refute this claim. The justification for approaching the historical data in this way is that we find other legal and logical factors in the situation, in connection with which, for legal purposes, the historical data ought to be considered. These other factors outweigh in importance any conclusion which history alone can give.

The first is the factor of expediency. Another is the postulate of legislative supremacy except in so far as the executive is made coordinate with reference to certain defined areas of discretionary power.⁶⁴ Another is the premise that rules of constitutional

⁶³ Willoughby on the Constitution, I, §28.

⁶⁴ See next chapter.

construction are properly to be considered as working hypotheses—not fixed rules for deciding doubtful cases, but tools for their investigation.⁶⁵ Is not this actually what is meant when it is said that contemporaneous and long-standing practice is decisive only in case of doubt? ⁶⁶ For the “doubt” is really the doubt of the court concerning the weighting of the other factors.⁶⁷ And if the other factors give us a contrary answer, the weight to be attached to practice is discounted.

Furthermore, we may interpret the rules of construction themselves. Contemporaneous construction loses much of its significance if it tends to show that no meaning, as to removals, is assignable to the Constitution as drafted and adopted, and that the framers were really divided as to what meaning should be assigned to it by the first Congress.⁶⁸ Long-standing practice is less significant when not continuous, and if the Court itself evaded the issue so long as possible.⁶⁹

The first Congress of 1789 did hold that the President has the sole power of removal directly from the Constitution. The question whether Congress might control that power by proper regulations was

⁶⁵ Dewey, *Human Nature and Conduct*, pp. 240-241.

⁶⁶ Cf. Willoughby on the Constitution I, §§ 28-29. See Hart, *The Ordinance Making Powers of the President*, p. 142.

⁶⁷ Cf. section below entitled “Reflective Thinking and the Choice of Premises.”

⁶⁸ See last preceding section of this chapter.

⁶⁹ The Court has never passed upon the whole problem, except in the *Myers dicta*.

not directly before them. We have as much right to construe their decision strictly as the Chief Justice had to discount the significance, as contemporaneous evidence, of John Marshall's *dictum* on tenure in *Marbury v. Madison*.⁷⁰

Only nine of the eighteen ex-members of the Convention can be said to have accepted the constitutional grant idea as the "proper" construction of the Constitution. The object of the combined majority on the final vote was to prevent senatorial participation in administrative supervision. That is all the final vote can be strictly said to have decided. Convention members changed their views during the debate. The result, as evidence of the "intent" of the "framers" of 1787, tends to show they had no intent. Even if it tended to show they had some intent, the debate would not be conclusive. The Convention debates are themselves not conclusive of "intent of the framers."⁷¹ Moreover, the Constitution emanates, as it purports to emanate, from "We, the people." The "meaning" is to be determined, in strict orthodoxy, in case of doubt, by the "intent" of "the people."⁷² The "intent of the framers" is, at best, only evidence of that intent. For this reason the fact that the *Federalist*,⁷³ which was intended to convert the people in waver-

⁷⁰ See the treatment given in the Myers case of Marshall's *dictum* on tenure in *Marbury v. Madison*.

⁷¹ Willoughby, on the Constitution, I, §32.

⁷² *Ibid.* (quoting Cooley). See also Hart, *op. cit.*, pp. 125-126.

⁷³ No. LXXVII.

ing states, accepted the senatorial participation theory, is of great significance. Even though that theory is not now tenable, it is important—whatever Hamilton's later views were as an individual—that many people were probably led to believe that the President would not have a sole power of removal. These people might have been highly shocked at the idea of a sole and absolute presidential power of removal.

The reasonable conclusion is that a flip of the coin may determine both the intent of the original framers, and of the people, in their respective tasks of drafting and "ordaining" the Constitution.

Dr. Thach regards the first Congress as a sort of adjourned session of the Convention to fill up this important gap.⁷⁴ Strictly, it was only a "Congress," except as it gives evidence of an original intent, which it does not clearly do, as we have shown. Now just as a sovereign legislature cannot bind its successors, so a legislature of limited competence cannot bind its successors, when acting within the scope of its competence. The fact that we have here the *first* Congress has no significance except as evidence of "intent." And this point must be insisted upon in the light of the fact that only half the members of the House, approximately, really held the constitutional grant idea; and that these did not have before their minds the possibility that the alleged constitutional power of removal might be regarded

⁷⁴ Op. cit., chap. VI, especially pp. 141-142.

as a conditional power. The fourteen legislative grant men, if they had felt it expedient, could logically have accepted our conditional power theory even after they had voted for the constitutional grant idea. Probably many of them would accept it if they were living today.

The Senate, moreover, was tied, the Vice-President giving the casting vote; and the debated clause would have been struck out in the Senate, had not two members "recanted," while only one member changed his mind to vote to strike out! These facts discount the idea that the decision be taken as "final," or that it be taken to be a decision of all aspects of the problem. Whether, indeed, the first Congress thought it had settled the question in all its phases forever, is different from the inquiry whether we are bound to take their action as having settled it forever.

What about later practice? Congress did not disturb the *status quo* for many years. But in 1835 three leading senators and constitutional lawyers expressed disapproval of the idea that Congress had no power to regulate tenure. In a sense, and despite the fact that Congress positively recognized the power of removal in later statutes, its part was one of acquiescence in the arrangement of 1789. This acquiescence may be contrasted with the positive assertion of a right to take action, which is more significant as "practice." But the chief reason for discounting this "practice" is that it was, during

all this period, the result of a conviction that, as a matter of expediency, unrestricted authority to remove ought to be left to the President. This was on grounds of efficiency, vigor, and consistency in administration.⁷⁵ There was, undoubtedly, grave doubt as to the validity of statutes aiming to control the power. But until the recent elaboration of administrative services, some of which exercise quasi-legislative and quasi-judicial powers, the types of control which we advocate were not much discussed. The issue largely centered around granting the Senate a check upon the President, rather than granting officers independence of tenure. For this reason we are justified in saying that, despite all practices, the problem before us has never been thoroughly threshed out as a separate issue. It is a separable problem, and will never be settled until it is threshed out as such.

From 1867 to 1869, and to a limited extent to 1887, Congress definitely asserted a right to control the removal of all department heads. From 1872 to 1926 it definitely asserted the right to control the removal of the Postmaster General, appointed by the President and the Senate. This is not without significance, although its efforts during this period were along lines held in 1926 to have been illegitimate. The fact remains that Congress did not without interruption acquiesce in the theory of sole and absolute

⁷⁵ See the *Federalist*, No. LXX.

presidential power. And it has of late asserted a right such as we claim for it, and one not yet held to be invalid.

Add to this the fact that Presidents have sometimes signed bills regulating tenure in ways we advocate, and that presidential claims are to be discounted as at least as biassed as those of Clay, Calhoun, and Webster, if not those of Congress in 1867, and presidential practice is seen not to have been entirely uniform and certainly not to be conclusive.

The claim of the Chief Justice that the Court has, in any strict sense, "acquiesced" in a practice the validity of which it has, except in 1926, consistently refused to pass upon, seems to be rather far-fetched. Judicial *dicta* are ambiguous, and not conclusive of the question. The 1926 decision does not touch the problem before us.

If it be asked whether the premises of Madison and others are binding upon us, the answer is that, since there was no agreement, even among the members of the Convention who participated in the 1789 debate, we are not bound by the premises of "Mr. Madison and his associates." If Madison's premises are binding, are we to take the premises he at first entertained or those he finally adopted?⁷⁸ If he could change his premises during a debate, how can we tell but that, if living today, he would change back again?

⁷⁸ Thach, *op. cit.*, pp. 151-152.

We have thus laid the basis for assigning practice, as well as contemporaneous exposition, a minor rôle among our factors. One or two points may be added. The necessary and proper clause, to which we shall appeal, was appealed to in the House in the 1789 debate.⁷⁷ Maclay's picture of the Senate debate,⁷⁸ though biassed, gives slim foundation for holding this generation bound by a decision thus arrived at, certainly for holding that it covered all phases of the problem. The argument that President Harding is said to have signed the Budget Act on the theory that he still had an additional power of removal at pleasure is a very weak one. And, finally, a practice based upon the reverence attached to the decision of 1789 is weakened by our analysis of that decision. A house is no stronger than its foundation.

Some Legal Factors in the Situation. President Goodnow has suggested that the opening sentence of Article II, which "vests" "the executive power" in the President, was originally meant merely to characterize and summarize the specific powers that follow. Then, in 1789, this sentence was appealed to as a grant of power in order to get a basis for the sole power of removal of the President.⁷⁹ With the merits of this issue we are not here concerned. But against the former construction of the sentence there is the doctrine that no part of

⁷⁷ Thach, *op. cit.*, p. 150.

⁷⁸ *Maclay's Journal*, pp. 106-114.

⁷⁹ Goodnow, *Principles of the Administrative Law of the United States*, pp. 73-82.

the Constitution is redundant. This rule of construction⁸⁰ is doubtless a good working hypothesis; but to anyone at all familiar with the manner in which documents in the framing of which various people participate, are evolved, it seems naïve to make a fetish of such a rule. No better example of this can be found than the following: the fact that an illimitable constitutional power of removal has been ascribed to the President alone makes utterly superfluous the grant to the President of authority to require the opinion in writing of the principal officers in the departments.⁸¹ The present writer might, but emphatically does not, bring forward the inclusion of this presidential power as an argument in favor of a lack of administrative control through removal on the part of the President. It may fairly be urged, however, against the conclusion that the Constitution must "necessarily" be interpreted as granting an "absolute" power of removal to the President.

The premise that the power to appoint implies and involves the power of removal is a two-edged sword. Professor Corwin is doubtless correct in his claim that it would seem to imply acceptance of the senatorial participation theory.⁸² Hamilton, in the *Federalist*, may be quoted to this effect.⁸³ The Chief Justice, on the other hand, has used this, along with

⁸⁰ Cf. *Hurtado v. California* (110 U. S. 516).

⁸¹ Article II, sec. 2, par. 1.

⁸² *The President's Removal Power*, pp. 52 ff.

⁸³ No. LXXVII.

other arguments, in quite a different way. He holds that the power of the President is to appoint, that of the Senate to advise and consent to appointments. The power of removal is deduced from the former power, not from the former plus the latter.⁸⁴ By this simple expedient the Senate's own weapon has been turned against it. The fact is, that this subject has been so long debated that a considerable percentage of the possible interpretations has by now been evolved. It is so easy, by a careful selection of quotations, to give plausible support to almost any theory one may select, that this essay has deliberately refrained from giving an exhaustive account of these arguments and counter-arguments. Instead, it will advance one more theory upon the frank basis that it leads to the results set forth in Parts I and II as expedient. This theory will, it is believed, be as consistent with the main historical ideas involved as its competitors. It is set forth not as the "correct" answer to the question as to what the Constitution "means," but as a possible and at the same time expedient doctrine.

The Chief Justice refuses to give the Senate a share in removals on the theory that the power of removal is more peculiarly "executive" than the power of appointment. He says:

A veto by the Senate—a part of the legislative branch of the Government—upon removals is a much greater limitation upon the executive branch and a much more serious blending

⁸⁴ *Myers v. United States* (272 U. S. 52).

of the legislative with the executive than a rejection of a proposed appointment.⁸⁵

This is probably a reasonable and expedient conclusion; but it is to be remembered that the same argument does not apply to the power of Congress to regulate by statute the conditions of tenure. It may be unwise in practice to allow the Senate to exercise a check upon the administrative supervision of the President, and at the same time quite wise to grant quasi-judicial boards independence of both President and Senate.

Another important preliminary consideration is this: The Chief Justice appeals especially to the opening sentence of Article II, but drags in also the power of appointment and the faithful execution duty by way of reinforcing his argument.⁸⁶ We need not consider the effectiveness of this as an argument against senatorial participation, whether by constitutional right or legislative grant. The decision of the Myers case stands, regardless of the plausibility of the arguments of the opinion. But we may say here that these three clauses may just as easily be combined to deduce what Professor Corwin terms a conditional power of removal—one conditioned upon congressional rules as to tenure—as to deduce an absolute and illimitable power of removal.⁸⁷

⁸⁵ Ibid.

⁸⁶ Ibid.

⁸⁷ Cf. our constitutional theory to be set forth in the next chapter. Cf. also Corwin, *op. cit.*, pp. 56-57, 66. While our theory is by no means identical with that of Professor Corwin, we are indebted to him on several counts.

It is also easy to explain why the Chief Justice does not recognize the possibility of this alternative. In a general way, it is because he goes on the assumption that the framers must have had some "intent"; that the Constitution must have some definite "meaning," relative to this problem; and that by a proper application of "logic" he can discover that "meaning."⁸⁸

More specifically, the Chief Justice seems to feel himself "driven" by "logic" to his conclusion because he hypostatizes an abstract term: "the executive power." Maclay quotes Ellsworth as having said in the debate of 1789 that the power of removal is a "tree" on the President's "half-acre" of "executive power."⁸⁹ In this metaphorical argument the term "the executive power" is reified, made into a physical entity.⁹⁰ On this view, it follows as of course that for Congress to cut a single "limb" from the "tree" would be for it to "trespass" upon the President's "property right" in "the executive power." It is in effect this sort of "logic" which the Chief Justice employs.

⁸⁸ See section above on the "Legislative Decision of 1789," and the next chapter, section on "The Nature of Our Constitutional Theory."

⁸⁹ "I buy a square acre of land. I buy the trees, waters, and everything belonging to it. The executive power belongs to the President. The removing of officers is a tree on this acre. The power of removing is, therefore, his. It is in him. It is nowhere else." *Maclay's Journal*, p. 114.

⁹⁰ Cunningham. *Textbook of Logic*, p. 403; Ogden and Richards, *Meaning of Meaning*, pp. 99, 133-134, 185, 255, 294.

Is such a line of reasoning "necessary"? The best proof that it is not is the fact that in other connections the Court has failed to apply it. A single example will suffice. If the "half-acre" of power given to Congress is, "every square foot" of it, "legislative," then for it to "give" any of it to the President would be for it to violate the maxim: *delegata potestas non potest delegari*.⁸¹ The Court, however, has not applied any such reification of the concept "legislative power" for the purposes of the cases involving delegations. It has consistently upheld delegations to the President and other administrative authorities of the power, within limits often defined only in abstract terms, to exercise discretionary and even rule-making functions.⁸² It has said that these were not delegations of "legislative" power, or were not "unconstitutional" delegations of legislative power. In *Wichita R. R. and Light Co. v. Pacific Utilities Commission of Kansas*,⁸³ Mr. Chief Justice Taft spoke of this practice as a "qualification" of the maxim. This is simply another way of phrasing the same result. The point is that here the Court reached a given result by refusing to reify its concepts; whereas the Myers opinion employed such reification to arrive at a certain result. After the hypostatization of the terms, the answer is

⁸¹ Cf. Fairlie, *National Administration of the United States*, p. 23.

⁸² See Hart, *The Ordinance Making Powers of the President*, chap. VI.

⁸³ 260 U. S. 48.

"logically necessary." But such metaphorical hypostatizations are themselves not necessary.

The proclamation of the President decreasing the customs duties on bob-white quail⁹⁴ was "legislative" in the sense that it actually modified a statute, that it set forth a rule, and that its consequences for importers of bob-white quail were the same as if the change had been made by Congress. But it was not "legislative" in the sense of being the product of full discretion in the premises.⁹⁵ And it is not necessary to tag it as "legislative" for the purpose of the rule against delegation, or for the purpose of the principle of the separation of powers. This was in effect the position of the Court in this class of cases.⁹⁶

This is not "illogical." To anyone familiar with the use of verbal symbols, the idea that a power may be "executive" for one purpose, and at the same time not "executive" for another purpose, is a truism. No better illustrations of this can be found than in the law. The curious reader is referred to the opinion of Mr. Justice Holmes in *International Stevedoring Co. v. Haverty*.⁹⁷ As Ogden and Richards remind us in their *Meaning of Meaning*, all definitions are *ad hoc*.⁹⁸

⁹⁴ 44 Stat. at L., Part II, 2588.

⁹⁵ For Congress delegated authority *only* to increase or decrease by 50 per cent the rates it had fixed in the Tariff Act of 1922.

⁹⁶ See note 80 above.

⁹⁷ 272 U. S. 50.

⁹⁸ P. 111.

With reference to the principle of the separation of powers, to which the Chief Justice appeals in order to show the impotency of Congress to "trespass" upon the removal power, certain observations may be made at this point. For the purposes of this rule a distinction might easily be made between tenure of office acts which seek to give a "legislative" organ like the Senate a "share" in this "executive" power, and those which merely prescribe rules, lay down policies, with reference to the exercise of this "executive" power by "executive organs." In short, the act of removal might, where exercisable at all, be exercisable only by an executive agency; while the making of rules as to tenure might at the same time be held a "necessary and proper" law for carrying into execution the policy of Congress that the Interstate Commerce Commission be free from outside political pressure and control.⁹⁹

The attitude in which such a doctrine as the separation of powers is to be approached, if approached intelligently, is well set forth by Mr. Justice Holmes as follows:

The great ordinances of the Constitution do not establish and divide fields of black and white. Even the more specific of them are found to terminate in a penumbra shading gradually from one extreme to the other. Property must not be taken without compensation, but with the help of a phrase (the police power) some property may be taken or destroyed for

⁹⁹ Cf. our conclusions in the next chapter.

public use without paying for it, if you do not take too much. When we come to the fundamental distinctions it is still more obvious that they must be received with a certain latitude or our government could not go on.

To make a rule of conduct applicable to an individual who but for such action would be free from it is to legislate—yet it is what the judges do whenever they determine which of two competing principles of policy shall prevail. At an early date it was held that Congress could delegate to the Courts the power to regulate process, which certainly is lawmaking so far as it goes. . . . With regard to the Executive, Congress has delegated to it the power to impose penalties . . . to make conclusive determination of dutiable values . . . to establish regulations as to forest reserves . . . and other powers not needing to be stated in further detail. . . . Congress has authorized the President to suspend the operation of a statute, even one suspending commercial intercourse with another country . . . and very recently it has been decided that the President might be given power to change the tariff. . . . It is said that the powers of Congress cannot be delegated, yet Congress has established the Interstate Commerce Commission, which does legislative, judicial and executive acts, only softened by a quasi; makes regulations . . . issues reparation orders, and performs executive functions in connection with Safety Appliance Acts, Boiler Inspection Acts, etc. Congress also has made effective excursions in the other direction. It has withdrawn jurisdiction of a case after it has been argued. . . . It has granted an amnesty, notwithstanding the grant to the President of the power to pardon. . . . A territorial legislature has granted a divorce. . . . Congress has declared lawful an obstruction to navigation that this court has declared unlawful. . . . Congress long ago established the Smithsonian Institution to question which would be to lay hands on the Ark of the Covenant; not

to speak of later similar exercises of power hitherto unquestioned, so far as I know.

It does not seem to need argument to show that however we may disguise it by veiling words we do not and cannot carry out the distinction between legislative and executive action with mathematical precision and divide the branches into watertight compartments, were it ever so desirable to do so, which I am far from believing that it is, or that the Constitution requires.¹⁰⁰

Another criticism of the reasoning in the Myers opinion may be made. By starting with the opening sentence of Article II, and deducing therefrom an absolute power of removal, the Chief Justice has already reached his conclusion before he considers the "necessary and proper" clause of Article I or the power of Congress to create offices. But it is just as easy to start with the latter powers of Congress,¹⁰¹ give them an absolute interpretation, and then proceed to deduce the conclusion that the President has no power of removal unless by legislative grant. Professor Corwin pointed this out when he said: "The confrontation of the 'executive power' of the president with the 'necessary and proper' powers of congress supplies, indeed, the grand issue of the [Myers] case."¹⁰²

It is possible, however, to seek a middle course: to read together all the relevant clauses of both

¹⁰⁰ From his dissenting opinion in *Springer et al. v. Government of Philippine Islands* (277 U. S. 189).

¹⁰¹ Thach points out that this argument was used in the grand debate of 1789. *Op. cit.*, pp. 150-151.

¹⁰² *Op. cit.*, p. 9.

Article I and Article II. In so doing we follow the fundamental rule of construction that the Constitution must be read as a whole.¹⁰³ By failing to do this, we should overemphasize either Article I or Article II, and thus brush aside relevant sections of the other Article. By following this rule of guidance, we get neither an absolute power of Congress to legislate nor an absolute power of the President to remove. The possibility of this "middle ground" theory was brought out by the then Solicitor General James M. Beck in his argument on rehearing in the Myers case.¹⁰⁴ We may now proceed to elaborate our conception of how this theory may be developed in detail.

The Logical Situation. As we approach the question whether Congress shall be held to have the power to regulate by statute the tenure of certain officers appointed by the President, or by the President with the Senate's consent, we may examine the logical situation in which our survey of relevant data has left us.

Although the Constitution is silent on the matter,¹⁰⁵ under our legal habits of thought our conclusions must be expressed in terms of inferences drawn from that document. But this, be it repeated, is but a mode of formulating our conclusions. The

¹⁰³ Willoughby on the Constitution (2d ed., 1929), I, § 40.

¹⁰⁴ Sen. Doc. 174, 69th Cong., 2d sess., pp. 69-71. His statement of the middle ground theory, however, is in milder terms than that given in chap. VII below.

¹⁰⁵ See section above, this chapter, entitled "The Text of the Constitution."

heart of the decision in such a case is the "reflective thinking" by which the premises for these conclusions are arrived at. What we "deduce" from the depths of the Constitution's silence will depend, necessarily, upon what we read into those clauses of the instrument which we consider "relevant" to the issue.

To this reflective thinking our legal habits of thought also demand that we bring to bear certain kinds of data. What these are is determined by the rules of constitutional construction.¹⁰⁶ These data we have already examined to the extent necessary to show that they give us no answer of such persuasive force that it would be "juristic treason" to reject it.

In short, some competent authorities have combined the Constitution, history, precedents and "logic" to reach one result, others to reach an opposite result. It would be absurd to pretend that one school of thought is more "logical" than the other. Their differences are due to the fact that their researches and reflection lead to opposite premises from which to deduce; and there is no necessity that we accept any particular set of premises.¹⁰⁷

¹⁰⁶ Cf. Willoughby on the Constitution (2d ed., 1929), I, chap. II.

¹⁰⁷ We do not have to accept any one of these conflicting sets of premises. The framers present in the first Congress differed as among themselves in this regard. See above, this chapter, sections entitled "The Legislative Decision of 1789," and "Constitutional Practice."

In this connection, it is well to have clearly in mind the nature of deductive logic. Professor Keyser says:

Any question whatever leads sooner or later to a proposition purporting to answer it, and every such proposition belongs to one or the other of two mutually exclusive and basic types. If the question be one concerning the make-up of the actual world—the world of actuality—the answering proposition will be categorical, asserting outright that such-and-such is the case. But if the question be one concerning the constitution of the infinitely vaster world of Possibility, the answering proposition will be Hypothetical, asserting that, if such and such supposable things were actual, then such-and-such other things would, of necessity, be so, too.¹⁰⁸

Science seeks categorical answers to questions; logic—and mathematics, which is the limbs on the tree of logic¹⁰⁹—seeks hypothetical answers. Scientific “truth” is truth in the empirical sense (E-sense), logical and mathematical “truth” is truth in the deductive sense (D-sense).¹¹⁰ Mr. Chief Justice Taft’s use of logic depended upon the premises from which he deduced. Since he was free to start with other premises, he might by equally logical reasoning have reached different conclusions.

Deductive logic, then, gives us “truth” only in the if-then forms. We can say of it what Mr. Bertrand Russell has said of mathematics—that it is the science in which you never know what you are talk-

¹⁰⁸ Keyser, *Pastures of Wonder*, pp. 7-8.

¹⁰⁹ Wilson, “Empiricism and Rationalism,” in *Science*, July, 1926, p. 49.

¹¹⁰ Keyser, *op. cit.*, pp. 28-39.

ing about or whether what you say is true (in the E-sense of truth). Of syllogistic reasoning the same writer declares that it

is just the sort of thing that a calculating machine could do better than a professor. In syllogistic inference, you are supposed to know already that all men are mortal and that Socrates is a man; hence you deduce what you never suspected before, that Socrates is mortal. This form of inference does actually occur, though very rarely. . . .

The inferences that we actually make in daily life differ from those of syllogistic logic in two respects, namely, that they are important and precarious, instead of being trivial and safe. The syllogism may be regarded as a monument to academic timidity.¹¹¹

Deductive inference is undoubtedly one aspect of the thinking process. Every sane man who understands the matter agrees that the premises of a valid syllogism imply the conclusion.¹¹² And in his thinking he "infers" at every step without formulating a syllogism.¹¹³ What Mr. Russell means is

¹¹¹ Russell, *Philosophy*, p. 79.

¹¹² He does this even if the "classes" with which the syllogism deals are mere verbal symbols that are "presumed" to stand for classes of objects, the objects being unknown. Thus we must all admit that if all gostaks are doshes, and all doshes are galloons, it follows that all gostaks are galloons. This shows the empty formality of deductive "truth."

¹¹³ See Russell, *Philosophy*, chap. VIII, on "Inference as a Habit." Before they can speak, much less formulate syllogisms, infants infer by what Russell calls "physiological inference." It may be that the "conditioned reflex" is at least the germ of higher forms of inference. At any rate, in actual thinking, induction and deduction are two aspects of the same process, as in the physiological inference, and formal logic is a useful but sophisticated "rationalization" of the *formal* aspects of the thinking process as a set of psychological phenomena.

that the formally elaborated syllogism, as for example that set forth in a judicial opinion, is not itself the important element in the inference, but the presentation of the judge's conclusion. The really vital step is in the choice of premises.

Let us apply this to the problem before us. It is easy to "deduce" the answer that the Comptroller General is an officer whom the President may remove at pleasure regardless of statutory limitations. All we have to do is to supply the following premises:

All executive officers whom the President appoints are officers whom the President may remove at pleasure regardless of statutory limitation.

The Comptroller General is an executive officer whom the President appoints.

But it is equally easy to "deduce" from other premises that the Comptroller General is an officer whose tenure Congress may regulate by statute. The major premise may be selected from the following:

All the officers who may be classed as essentially legislative officers are officers whose tenure Congress may regulate by statute.¹¹⁴

All officers whose offices are created as necessary and proper means for carrying into execution the powers vested by the Constitution directly in Congress, are officers whose tenure Congress may regulate by statute.¹¹⁵

¹¹⁴ Cf. Willoughby, W. F., *The Legal Status and Functions of the General Accounting Office*, chap. I.

¹¹⁵ Cf. our constitutional theory of the removal power in the next chapter.

The whole matter is summed up in the cryptic sentence of Mr. Justice Holmes: "You can give any conclusion a logical form."¹¹⁶

In short, in a "new case" where there are, as here, no obviously conclusive precedents to give the answer, the heart of the case is not a problem in deduction. It is—stated in terms of formal logic—the selection of premises from which to deduce. It is only after the premises are selected that the conclusion is deduced as "truth" in the D-sense. The judge who does not realize this will be apt to pay insufficient attention to this choice of premises, and will justify this haphazard procedure by assuming that his answer must be "right" because it is "logical."

This logical analysis of the situation may seem like an elaboration of the obvious. Yet judges and lawyers often talk as if they were, in doubtful questions like the one before us, under the "compulsion of logic" to reach the conclusion which they set forth. Only on that assumption would their assertion that the judge does not make, but merely "finds" the law by a process of deduction, have any meaning. They proceed to set forth truth in the D-sense as if that were a "reason" for their conclusion. In a matter like the power of removal, derivation of "truth" in the D-sense is not—cannot be—the whole story, because it is always possible to derive a contradictory "truth" in the D-sense.

¹¹⁶ Holmes, "Path of the Law," in *Collected Legal Papers*, p. 181.

The heart of the decision comes in the choice of premises. To quote Mr. Justice Holmes:

The training of lawyers is a training in logic. The processes of analogy, discrimination, and deduction are those in which they are most at home. The language of judicial decision is mainly the language of logic. But . . . behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding. You can give any conclusion a logical form.¹¹⁷

Reflective Thinking and the Choice of Premises. The choice of premises may be approached as a study of the "non-vocal behavior,"¹¹⁸ the psychology of the judge in action, or as an idealized analysis of the technique of "reflective thinking." A full discussion of the former approach would take us too far afield. It would require a separate volume to seek to analyze in detail the judicial mind as it works under all conditions. We must be content to indicate a technique by which—and this is one of our basic assumptions—the judicial mind may work most intelligently.

"Reflective imagination" is the term which John Dewey employs¹¹⁹ to describe what he elsewhere terms "deliberation"¹²⁰ and the employment of "intelligence."¹²¹ Essentially the same thing is

¹¹⁷ Ibid.

¹¹⁸ Oliphant, "A Return to Stare Decisis," in *American Law School Review*, March, 1928.

¹¹⁹ Dewey, *Human Nature and Conduct*, p. 172.

¹²⁰ Ibid., pp. 189 ff.

¹²¹ Ibid., pp. 172 ff., 248 ff.

referred to by James Harvey Robinson as "creative thinking,"¹²² by Everett Dean Martin as "problem-solving thinking,"¹²³ and by Wolfgang Köhler as "insight."

Intellect, Dewey points out, is not separable from impulse and habit.¹²⁴ When habits fail to furnish adjustment to environment, impulse stimulates reflection—unless it merely leads to blind, explosive action.¹²⁵ Habits mold original, native impulses,¹²⁶ and operate upon intellect by fixing its boundaries, and also by enabling it to observe and predict human behavior.¹²⁷ Further, the more flexible, the less routine our habits, "the more refined is perception in its discrimination and the more delicate the presentation evoked by imagination."¹²⁸

In adjudication, the rôle of habit is well represented by the practice of *stare decisis*, to which Dewey's observations apply. "Without habit, there is only irritation and confused hesitation. With habit alone there is machine-like repetition, a duplicating recurrence of old acts. With conflict of habits and release of impulse there is conscious search."¹²⁹

"Deliberation" Dewey describes as "a dramatic rehearsal (in imagination) of various competing possible lines of action. . . . What then is choice?"

¹²² Robinson, *The Mind in the Making*, chap. II.

¹²³ Martin, *Psychology*, Lecture IX.

¹²⁴ Dewey, *op. cit.*, p. 172.

¹²⁵ Cf. *ibid.*, pp. 169-171, 175-180, and *passim*.

¹²⁶ *Ibid.*, pp. 95-168.

¹²⁷ *Ibid.*, pp. 172, 175.

¹²⁸ *Ibid.*, pp. 175-176.

¹²⁹ *Ibid.*, p. 180.

Simply hitting in imagination upon an object which furnishes an adequate stimulus to the recovery of overt action. . . . It is a great error to suppose that we have no preference until there is a choice. . . . The occasion of deliberation is an *excess* of preferences. . . . Choice is not the emergence of preference out of indifference. It is the emergence of a unified preference out of competing preferences.”¹³⁰

What we have termed, in the language of formal logic, the selection of the premises from which to deduce is, at its best, this search for readjustment, carried on in imagination. In the judicial process, our habits of thought lead us at once to examine the prior cases. We carry to this examination either a definite preference between competing alternatives or sometimes that excess of competing preferences of which Dewey speaks. If our examination of prior cases leads to a conclusion which is in conformity with a definite preference, we do not stop to decide whether to take a broader or a narrower generalization as the “rule” of a prior case. If such examination of prior cases leads to a conclusion which conflicts with such a definite preference, the prior cases are only rarely overridden in express terms. Instead, an effort is made to choose a narrower “rule” for the prior cases, in order to draw “distinctions.” If this is not possible, the precedents prevail, unless the maladjustment that will result from following them is forced upon the attention.

¹³⁰ Ibid., pp. 190-193.

A conflict between precedents and off-hand preferences should, and often does, stimulate a careful re-examination of both. But the same result comes also where the precedents are obviously "distinguishable" from the present case, and where at the same time there is an excess of preferences. Reflection about the public policy involved is here necessary to furnish an "adequate stimulus to the recovery of overt action."

If we are able to "distinguish" the prior cases from the situation under consideration, we are thus left without binding precedents. But our judicial habits of thought lead us next to turn to certain other types of relevant data which are determined for us by the rules of constitutional construction.¹³¹

These data—contemporaneous construction, long-standing practice and the like—may give more or less definite answers. They may also—and this is crucial—agree or conflict with our conclusions on the relative expediency of competing alternatives. Where history and practice agree with expediency, "the object which furnishes an adequate stimulus to the recovery of overt action" is hit upon. But where history and practice are ambiguous, or where, though definite, they give an answer that seems to lead to inexpedient consequences, careful reflective thinking is necessary.

It is at this stage that the expediency of deciding a given way, thought of in terms of its governmental

¹³¹ Willoughby on the Constitution (2d ed., 1929), I, chap. II.

or social or economic consequences, as the case may be, comes into especial prominence, and becomes the subject of careful reflection.

Historical evidence is often subject to contradictory interpretations.¹³² There are often competing legal analogies and theories.¹³³ Practice may not have been uniform, or may be interpreted in different ways.¹³⁴ Where this is the situation, it is one of our basic assumptions that public policy should furnish the answer.

If there is a direct conflict between the weight of evidence furnished by the data under consideration and what appears to be sound public policy, then the judge must by reflection decide which to choose. We hold that he should choose the "expedient" alternative. But here a distinction is to be drawn, and a warning sounded.

By the "expedient" alternative we mean, at this point, that which a full consideration of all factors in the situation leads the judge to regard as expedient. It may happen that a judge who would decide one way if he had a perfectly clean slate before him, will properly decide the other way if it would appear inexpedient to upset firmly established customs of the community. Expediency in the light

¹³² Cf. the majority opinion in the Myers case with the section above, this chapter, on "The Legislative Decision of 1789," and with Corwin, *The President's Removal Power*.

¹³³ See Rueff, *From the Physical to the Social Sciences*, Introduction by Oliphant and Hewitt.

¹³⁴ See above, this chapter.

of all factors involved is thus to be preferred to expediency in the sense of what would, in an ideal situation, seem best for the community. There is no rule of thumb by which the judge can weigh the factors in the actual situation before him. Deliberation is necessary.

Hence, if the judge's views of public policy conflict with the data furnished by applying orthodox rules of constitutional construction, all we can say is: (1) That an otherwise expedient answer is not to be rejected merely because an opposite answer is furnished by applying the orthodox rules. "Expediency," as carefully determined by reflection, is to take precedence over "orthodoxy." It is for this reason that the earlier failure of Congress to assert its power to regulate tenure is so readily dismissed above.¹³⁵ (2) That the relative weight to be given to the judge's views of expediency and orthodoxy depends in large part upon how clear and how important the public policy involved appears to be. In a minor matter, where the expediency is largely a question of personal opinion, the judge will defer to exceptionally clear contemporaneous evidence. But if he is "sure" of his views of public policy in an important matter, then expediency (in the broad sense indicated above) must prevail.

What this implies should be obvious. To be "sure" of his position on public policy does not

¹³⁵ Ibid.

mean that he must be absolutely certain. That is humanly impossible.¹³⁶ It means that in making his final choice the judge must carefully deliberate upon the question, using all available facts and theories, and arrive at a "working hypothesis" which he considers sufficiently well supported to justify a choice in its favor. If he gets this, then he has in deliberation hit upon that object which leads to overt action—to his decision.

Too much stress cannot be laid upon the importance of this careful reflection, nor upon the need for judges to realize this importance. Here is the heart of a decision in a situation like the one before us.

The rest is merely the process of arriving at "truth" in the D-sense. It consists, under our habits of legal thought, in formulating the conclusion arrived at in terms of constitutional interpretation. The judge reads into the Constitution premises which, by deduction, will give him this conclusion.

In reflective thinking about public policy, thus seen to be the heart of the decision in cases of the sort under discussion, the judge should, so far as possible, employ the same "scientific method of reasoning" which we described in our chapter on the administrative tribunal.¹³⁷ This clearly involves "value-judgments," but these ought to be

¹³⁶ Cf. Ratner, *Philosophy of John Dewey*, pp. 240-241, and Dewey, *The Quest for Certainty*, *passim*.

¹³⁷ See chap. II above.

arrived at by an approach to scientific analysis rather than as the unreflective prepossessions of the judge.

Value-judgments are not the derivation of "truth" in the D-sense; but, at least in a case like the one before us, they guide us in the selection of premises for the deduction of "truth" in this D-sense.

Are they the derivation of truth in the E-sense? We hold that they are not properly separable from "fact-judgments." For the relative value of alternatives is not separable from the consequences to which they lead. The function of the judge is not generally to be contrasted with that of the chemist. "Moral" truths and "factual" truths are analogous, if not to be identified. The method, at least, is basically the same, as Dewey so well shows.¹³⁸

Perhaps the contrast so often artificially drawn between the two "types" of judgments is due to the "fundamentalist" approach to "value" judgments which so many judges make. This is not unrelated to the human "quest for certainty."¹³⁹ But the artificial distinction is also due to an often overlooked fact. The value-judgments of the judge, in making an immediate authoritative decision, are but one phase, not the whole process, of arriving at truth in the E-sense—including under the latter

¹³⁸ See his illuminating chapter on moral principles in his *Human Nature and Conduct*, pp. 238-247.

¹³⁹ See on this Professor Dewey's latest book by that title.

term both value-truths and fact-truths as inseparable. For the final test of truth in this E-sense is verification in experience,¹⁴⁰ whereas the judge must make an immediate decision which is enforced and has its own consequences, apart from and prior to the test of experience. In effect, in the judge's decision, "trial and error" is imaginative, not overt.

Judicial reflection, in short, is the first stage in a long process of trial and error in practice, which alone furnishes the ultimate test of the "truth" of the conclusions in the E-sense of truth. Within the limits thus fixed, adjudication at its best applies, in imagination, the general method of science. The judge's prepossessions are more prominent than those of the scientist, partly because his facts are more difficult to obtain and weigh, partly because his conclusions are not so speedily or so easily checked by trial and error in practice, partly because there is such a complex situation that the results of trial and error take a less definite form. But these are differences of degree.¹⁴¹

Applying this summary analysis to the case before us, we find that expediency seems to dictate that Congress should have some power to guarantee independence of tenure. The Constitution being silent, there is only one prior decision that could be considered to be in point: the opinion in the Myers case claims that Congress has no such power. But con-

¹⁴⁰ See Ratner, *Philosophy of John Dewey*, pp. 191-200.

¹⁴¹ See reference in note 125 above.

sideration of the case shows that a strict application of the doctrine of *stare decisis* gives us a "rule" narrow enough to enable us to distinguish ours as a "new" case.¹⁴²

Mr. Chief Justice Taft gives the other relevant data an interpretation which conflicts with our assumptions as to expediency. Yet the fact that Mr. Justice Brandeis and Mr. Justice McReynolds do not read the data in the same way that the Chief Justice does, is enough to show that such data are ambiguous. Insofar as the answer drawn from these data is against our conclusion on expediency, we are forced to careful reflective thinking about consequences. This has led us in Parts I and II to set forth the results of a careful consideration—as opposed to a mere "hunch"—of the questions of public policy involved. This study gave us the conclusion that public policy definitely favors allowing Congress the power to regulate tenure in certain ways. It is also clear that the issue is of extreme importance. For it obviously goes to the very heart of such subjects as: administrative organization and functions; legislative power to regulate the same; whether the experiment of introducing the "scientific method" in certain quasi-legislative and quasi-judicial phases of administration may be tried under the most favorable conditions;¹⁴³ the

¹⁴² See chap. V above.

¹⁴³ See Part I, especially chap. II.

flexibility of our system, and its adaptability to meet new needs. The conclusions as to expediency are thus significant and reasonably clear. And we have found no factors which would seem to discount the expediency of adopting these general conclusions. We are thus led to select for our legal deductions a set of premises which will give this result.

Before thus formulating our conclusions on public policy in terms of a "constitutional theory of removals"—i. e., in terms of deductions drawn from premises read into the Constitution—we may give a somewhat fuller discussion of the rôle of conclusions as to public policy as the basis of our choice of premises in a situation like the one before us. It is a fundamental assumption that, in such a situation, expediency should be the determinant. This assumption we may state in terms of current theories of the judicial process.

The Basis of Our Choice of Premises. Where a judge is faced with a situation such as the one just outlined, we submit that he should choose the alternative calculated to lead to the most desirable social consequences. In his "Path of the Law" Mr. Justice Holmes says:

I think that the judges themselves have failed adequately to recognize their duty of weighing considerations of social advantage. The duty is inevitable, and the result of the often proclaimed judicial aversion to deal with such considerations is simply to leave the very ground and foundation of judgments inarticulate, and often unconscious. . . . I cannot

but believe that if the training of lawyers led them habitually to consider more definitely and explicitly the social advantage on which the rule they lay down must be justified, they sometimes would hesitate where now they are confident, and see that really they were taking sides upon debatable and often burning questions.¹⁴⁴

To state this important thesis in somewhat different terms, we are faced with a constitutional problem where it is peculiarly appropriate to apply what Judge Cardozo has termed the "sociological method." He says:

The directive force of a principle may be exerted along the line of logical progression; this I will call the rule of analogy or the method of philosophy; along the line of historical development; this I will call the method of evolution; along the line of customs of the community; this I will call the method of tradition; along the lines of justice, morals and social welfare, the *mores* of the day; and this I will call the method of sociology. . . .¹⁴⁵

From history and philosophy and custom, we pass, therefore, to the force which in our day and generation is becoming the greatest of them all, the power of social justice which finds its outlet and expression in the method of sociology. . . . The end which law serves will dominate them all. . . . The social value of a rule has become a test of growing power and importance. This truth is powerfully driven home to the lawyers of this country in the writings of Dean Pound. "Perhaps the most significant advance in the modern science of law is the change from the analytical to the functional attitude."¹⁴⁶

There is no branch [of the law] where the method [of sociology] is not fruitful. Even when it does not seem to

¹⁴⁴ Holmes, *Collected Legal Papers*, p. 184.

¹⁴⁵ Cardozo, *Nature of the Judicial Process*, pp. 30-31.

¹⁴⁶ *Ibid.*, pp. 65-66, 73. The quotation is from Dean Pound.

dominate, it is always in reserve. It is the arbiter between other methods, determining in the last analysis the choice of each, weighing their competing claims, setting bounds to their pretensions, balancing and moderating and harmonizing them all. . . .¹⁴⁷

. . . . Constitutional law, where the primacy of this method is, I think, undoubted. . . .¹⁴⁸

If you ask how he [the judge] is to know when one interest outweighs another, I can only answer that he must get his knowledge just as a legislator gets it, from experience and study and reflection; in brief, from life itself. Here, indeed, is the point of contact between the legislator's work and his. The choice of methods, the appraisal of values, must in the end be guided by like considerations for the one as for the other. Each indeed is legislating within the limits of his competence. No doubt the limits for the judge are narrower. He legislates only between gaps. He fills the open spaces in the law. How far he may go without traveling beyond the walls of the interstices cannot be staked out for him upon a chart. He must learn it for himself as he gains the sense of fitness and proportion that comes with years of habitude in the practice of an art. Even within the gaps, restrictions not easy to define, but felt, however impalpable they may be, by every judge and lawyer, hedge and circumscribe his action. They are established by the traditions of the centuries, by the example of other judges, his predecessors and his colleagues, by the collective judgment of the profession, and by the duty of adherence to the pervading spirit of the law. . . . None the less, within the confines of these open spaces, and those of precedent and tradition, choice moves with a freedom which stamps its action as creative. The law which is the resulting product is not found, but made. . . .¹⁴⁹

¹⁴⁷ Ibid., p 98.

¹⁴⁸ Ibid., p. 76.

¹⁴⁹ Ibid., pp. 113-115.

CHAPTER VII

A CONSTITUTIONAL THEORY OF THE POWER OF REMOVAL

The Nature of Our Constitutional Theory. We have been at pains to make explicit what this concluding chapter will seek to do. This is for two reasons. Our first purpose is to illustrate the technique by which, in "new" cases, the judicial process should proceed, if it is to proceed intelligently. "Every new case is an experiment."¹ A major aim is to explain by example the technique for conducting such experiments.

This involves the exposition of certain seldom considered facts about "documentary interpretation." The decision of a new case enunciates conclusions in terms of the "meaning" of the terms and propositions of the document. In reality, the judge *gives* meaning (relative to this new situation) to the terms and propositions which he considers "relevant." Hence, in saying what the Constitution "intends" as to removals, we shall merely be employing a convenient and less circumlocutionary form of stating that meaning which, among possible meanings, we ascribe to the text as a conscious means of reaching a predetermined result. Our "theory" is essentially a process of selecting

¹ Cardozo, *Nature of the Judicial Process*, p. 23.

“meanings” as premises for the deduction of expedient conclusions. The “meanings” and the elaboration of their implications are thus seen as a logical form or “dummy” upon which to hang our carefully derived empirical conclusions on public policy.

At present, the chief difficulty with the employment of this technique is the undeveloped character of the “empirical side” of the social sciences. “There is seldom any informed and exhaustive marshalling of the practical considerations *pro* and *con*. The court typically reaches its practical solution by reliance upon ‘common sense’—a sort of intuition of experience which assumes to know how to decide the practical questions of life merely as a result of having lived in life. . . . So far as law has an empirical branch, its precarious existence is largely unsuspected or is the haphazard product of a ‘common sense’ empiricism which professes no order and no methods.”² Our conclusions of Parts I and II, while systematically arrived at, are, after all, based upon what for a chemist would probably be insufficient empirical data. We accepted them as final only because the meagreness of such data is, in the present stage of “sociological jurisprudence,” a fact that limits the effective application of the method.

There is a second reason why we have sought to make explicit the “nature” of our “constitutional

² Rueff, *From the Physical to the Social Sciences*, Introduction by Oliphant and Hewitt, pp. xxv, xxvi.

theory." It is to be hoped that this will keep critics of the "theory" from beclouding the issue. Arguments are always unfairly treated when they are criticized by learned persons who approach the subject with wholly different inarticulate major assumptions.³ In this study, we are seeking to make explicit, so far as possible, the basic postulates upon which we proceed. These postulates are, of course, not set forth as absolute truth.⁴ They are open to attack by anybody so inclined. They should, however, be explicitly attacked as such.

For a critic to object, for example, to our assertion that the faithful execution duty gives the President no power to question the validity of a statute,⁵ on the ground that this is begging the question, is for him to ignore the fact that we are constructing a theory by deliberately selecting from among possible "meanings" those which will produce the desired end. Every syllogism begs the question. For he who constructs it assumes the premises. If he is to "prove" his premises, he must make some prior assumptions in so doing, and so on *ad infinitum*.⁶ All reasoning, in so far as it must make some assumptions,⁷ tacitly and unconsciously, if not

³ Holmes, "Path of the Law," in *Collected Legal Papers*, p. 184.

⁴ Cf. Ratner, *Philosophy of John Dewey*, pp. 240-241.

⁵ See section below entitled "Faithful Execution Duty."

⁶ This is true even when he derives his premises by the inductive method. See Ratner, *Philosophy of John Dewey*, pp. 178-185; and Rueff, *op. cit.*, p. xix.

⁷ See Keyser, *Pastures of Wonder*, pp. 86-90.

explicitly and consciously, thus begs the question. So does the classical syllogism about Socrates. If we did not already know that Socrates is mortal, we could not know him to be a man.⁸ And he who says that the question at issue is precisely whether the duty to see that the laws be faithfully executed involves a power to refuse to execute some statutes as not-law, is quite correct, but must himself beg the question whichever answer he gives. To say, then, that our theory of removals begs the question, and to leave it at that, will be to state a truism in the guise of a refutation.

The point is that we derive our premises by a conscious choice which is based upon a declared purpose. He who approaches the issue on the assumption that there is some "true meaning" which needs only to be "discovered" in the constitutional texts, as these are interpreted in the light of ambiguous historical evidence and inconclusive judicial precedents, and by the application of "logical methods," will not be reasoning in the same realm as we.⁹ If there is always a "margin of doubt"¹⁰ even where we are interpreting an explicit text, still more is this the case where we are faced by a silent text which is supplemented by inconclusive historical and judicial data.

⁸ Cf. Rueff, *op. cit.*, Introduction by Oliphant and Hewitt, p. xxi.

⁹ Cf. *ibid.*, pp. x ff.

¹⁰ Cf. The dissenting opinion of Mr. Justice Holmes which is quoted above in chapter VI, section on "Some Legal Factors in the Situation."

The Problem. The Constitution does not expressly mention a power of administrative supervision or a power of removal. The Convention debates do not afford an answer to the problem.¹¹ Nor does the legislative decision of 1789 answer the question immediately before us.¹² The latter, however, does suggest two preliminary inferences:

First: From the fact that the Constitution specifies tenure during good behavior for judges alone, we may infer that the framers did not intend to guarantee other officers such tenure. *Expressio unius est exclusio alterius.*

Second: If executive officers are not by the Constitution guaranteed tenure during good behavior, then there must be inferrible from the text some conclusions by which their tenure may be reduced to something short of such tenure. This means, at the least, a power of Congress to prescribe maximum terms. The majority of the House in 1789 went a step further, and inferred conclusions as to a power of removal other than by impeachment.¹³ We find this a reasonable, if not logically necessary, conclusion.

Assuming, then, that some principles as to removal of executive officers other than by impeachment are inferrible from the text, is it a fair inference that the President has an absolute power

¹¹ Thach, *Creation of the Presidency*, p. 141.

¹² See chap. VI above, section on that debate.

¹³ Thach, *op. cit.*, p. 145.

to remove at pleasure all officers whom he appoints? If so, Congress obviously cannot legislate on the subject. Or, should we infer that Congress has plenary power to legislate as to tenure? If so, in the absence of such legislation, are we to infer that Congress intends tenure during good behavior, or are we to infer a conditional power of removal for the President? Or, are distinctions to be drawn on the basis of the character of the office?¹⁴ We shall seek our answer by looking at all relevant clauses considered as a whole context.¹⁵ Even so, we shall have to make a choice of interpretations.

A Preliminary Consideration of Certain Aspects of our System in Action. The legislative function consists of formulating rules to govern societal relations. The legislative power means "to make laws for all parts, and every member of the society prescribing rules to their actions, and giving power of execution where they are transgressed."¹⁶ Under the Anglo-American reign of law, this power must express itself in terms of general regulations. "The

¹⁴ This possibility has been suggested by Professor Corwin, in his *President's Removal Power*, p. 61. Professor Thach points out that the possibility was suggested in the grand debate of 1789, but adds that "there was no disposition on the part of the proponents of presidential removal to rely on the argument of special relation to enumerated powers." *Op. cit.*, pp. 148, 149, 160. This we accept with reference to the conditional constitutional power of removal. We shall, however, use this very distinction in determining the cases in which the power of removal is absolute (illimitable).

¹⁵ Willoughby on the Constitution, I, 65.

¹⁶ Locke, *Two Treatises of Civil Government* (Everyman's Library), p. 193.

legislative or supreme authority cannot assume to itself a power to rule by extemporary arbitrary decrees, but is bound to dispense justice and decide the rights of the subject by promulgated standing laws, and known authorized judges."¹⁷

Under our system, all legislative powers (in this sense) which are delegated to the federal government are vested in Congress.¹⁸ But that body also possesses, as part of its legislative function, plenary powers of "administrative legislation,"¹⁹ within the whole range of federal power, except as this power may be held to be limited by constitutional grants to the other two departments. For Congress creates all executive offices except the Presidency,²⁰ creates and defines all powers of law-execution, and vests the same in such officers as it sees fit. The statutes may even prescribe reasonable qualifications for appointments, and thus in a sense narrow the range of presidential discretion in the exercise of his expressly granted power of appointment. The necessary and proper clause, indeed, is so worded as to give Congress plenary powers of administrative regulation, except that it may not "infringe"²¹

¹⁷ Ibid., pp. 185-186.

¹⁸ As per the opening sentence of Article I of the Constitution.

¹⁹ Freund, who approaches the subject from the viewpoint of continental Europe, calls it "legislative administration." See his "American Administrative Law," in *Political Science Quarterly*, IX, 403 ff.

²⁰ Constitution, Article II, sec. 2, par. 2.

²¹ Just what constitutes "infringement" we shall attempt to work out later. The matter must, be it noted, be worked out in the light of the power of Congress indicated in the text above. Here a choice is required, as to whether we start from this power of Congress or from

upon powers vested in the President by the Constitution. Our problem is to draw the line between this power of Congress and the executive powers of the President.

Turning to executive power, we find it to consist of two distinct categories: (1) the power of executing the laws; (2) a list of specific powers, which varies from system to system,²² but under ours is vested in the President by Article II of the Constitution for his independent exercise.²³

Now, in general, these two categories correspond, respectively, with the two *sources* of executive powers. The power of executing the laws is derived from the "administrative clauses" of the laws themselves; while the special, specific, independent powers of the President are derived from the Constitution directly. We may, therefore, describe the two categories as statutory executive powers and constitutional executive powers.

There are certain important differences between these two categories which will throw light upon our problem. The *content* of statutory executive powers, or the power of executing the laws (statutes), is defined by Congress; the content of the President's

an enlarged conception of executive power. We shall start with the idea of legislative supremacy except as limited by the delegation of special fields of discretion to the President.

²² In England, these are the statutory executive powers of the Crown on the one hand, and the prerogatives on the other. Cf. Locke, *op. cit.*, pp. 183-203.

²³ They are to be found in Article II, secs. 2 and 3, and include all therein listed.

specific constitutional powers is defined by Article II as judicially interpreted. The *location* of statutory executive powers is also determined by Congress, which may delegate them to the President or to such officers as it may create for the purpose. The only limitation is that, since "all legislative powers herein granted" are vested in Congress, and "the judicial power of the United States" is vested in the courts, the rule *expressio unius est exclusio alterius* requires that Congress "locate" statutory "executive" powers in non-legislative and non-judicial (and hence, by exclusion, in "executive") officers. On the other hand, the Constitution itself determines the location of constitutional executive powers: it vests them in the President, as a "single" Executive, for his independent exercise, either personally or through officers subject completely to his administrative supervision.

Now with reference to his specific constitutional powers, the President is coordinate with and independent of Congress. Congress may not so exercise its legislative function as to infringe upon the President's special powers.^{23a} That is, Congress may, in general, neither narrow the scope of the discretion thus constitutionally delegated to him, nor devolve the same upon officers who are independent of the President.

On the other hand, under the Anglo-American reign of law, the executive may exercise no power

^{23a} Cf. Taft, *Our Chief Magistrate and His Powers*, p. 126.

over private interests, in execution of the laws governing societal relations, except by virtue of authority delegated by the legislature. "Allegiance [to the British king] being nothing but an obedience according to law, which, when he violates, he has no right to obedience . . . he has no will, no power, but that of the law . . . the members owing no obedience but to the public will of the society."²⁴ Under our system, at least, the power of executing the laws is non-existent unless and until positively granted in the "administrative clauses" of the laws themselves. No executive officer may perform, as regards private interests, any act in execution of the statutes unless authorized thereby to do so. This applies to the President himself, as well as to statutory officers. We are here speaking of the *functional* side of law execution, where the executive officer is acting to enforce societal rules of the legislature against the private persons to whom they apply. Here, as our system is seen in action, the executive power is a creation of legislation.²⁵

This is also, to a large extent, true of the *institutional* side of the administrative organization, whether set up for law-execution or to aid the President in the exercise of his independent powers. The offices, their reasonable qualifications, their allocation of duties, their maximum terms of office, their

²⁴ Locke, *op. cit.*, pp. 193-194. Cf. Green, "Separation of Governmental Powers," in *Yale Law Journal*, February, 1920, pp. 375-376.

²⁵ It is for this reason that we are justified in the assumption—a basic one—which is made in note 21 above.

classification, their compensation—all these matters of administrative organization are determined by Congress, or by executive officers only by virtue of congressional delegations.²⁶ The problem of removals, relative to officers charged only with statutory executive powers, is: whether any power of the President under Article II is infringed when Congress seeks to prescribe rules of tenure which make officers of this sort independent of the President.

The solution of this problem will require an examination of Article II of the Constitution. It sets forth certain enumerated specific powers, with reference to which the President is admittedly coordinate with Congress. If the President is to be assigned an illimitable power to remove statutory executive officers, we submit that its source in this Article must be secured by one of the following lines of reasoning:

1. That some one enumerated power, say the appointing power, or the faithful execution duty, be held to "involve" a power of removal.

2. That some combination of such enumerated powers be held to "imply" a power of removal.

3. That the opening sentence of Article II vests in the President the power of removal as a specific

²⁶ See text below. We have already conceded that Congress may not make independent of the President those officers set up to exercise in his name his constitutional executive powers. The problem of tenure thus narrows down to one related to officers charged only with statutory executive powers.

power which is "executive" *ex vi termini* or by "intent of the framers."

4. That by the said sentence there is vested in the President the whole executive power, including the power of executing the laws, as well as the thereafter enumerated specific powers; and that, therefore, the President may supervise the discretionary exercise of statutory executive powers of law-execution which Congress delegates to other officers, and may accordingly exercise the correlative power to remove them.

5. That considering all these factors together, the President may be assigned an illimitable power to remove his appointees at pleasure.

We shall later so interpret the enumerated powers in the body of Article II as to avoid the conclusion that any or all of them give the President an illimitable power of removal. This will eliminate points 1 and 2 above. We submit that if we can eliminate the first four points, it will not be "necessary" to accede to number 5. The crucial issue, which demands first consideration, is involved in points 4 and 5, which we shall consider in reverse order. It is to be observed that both these lines of reasoning relate to the "meaning" of the opening sentence of Article II.

Does the Opening Sentence of Article II Vest in the President the Power of Executing the Laws, in the Sense of Supervising their Execution, and Hence the Correlative Power to Remove His Appointees

who Exercise Statutory Executive Duties?^{26a} The power of the President to exercise personally the delegations made in the body of Article II is not questioned. A possible meaning of the opening sen-

^{26a} In the grand debate of 1789 Gerry said: "Some gentlemen consider this a question of policy; but to me it appears a question of constitutionality, and I presume it will be determined on that point alone. The best argument I have heard urged on this occasion came from the honorable gentleman from Virginia, (Mr. Madison.) He says the constitution has vested the executive power in the President; and that he has a right to exercise it under the qualifications therein made. He lays it down as a maxim, that the constitution vesting in the President the executive power, naturally vests him with the power of appointment and removal. Now I would be glad to know from that gentleman by what means we are to decide this question. Is his maxim supported by precedent drawn from the practice of the individual States? The direct contrary is established. In many cases the Executives are not in particular vested with the power of appointment; and do they exercise that power by virtue of their office? It will be found that other branches of the Government make appointments. How then can gentlemen assert that the powers of appointment and removal are incident to the Executive Department of Government? To me it appears at best but problematical. . . ." (Annals of Congress, I, cols. 490-491.)

Fox v. McDonald (101 Ala 51; 13 So. 416) refused to hold invalid, under the distributing clause of the state constitution, an act which vested in the probate judge of Jefferson County the power to appoint police commissioners for the city of Birmingham. The separation of powers was not absolute, said the court, and it cited authority to show the power of appointment was not inherently executive.

In *Field v. People* (3 Ill. 79), the Governor had removed the Secretary of State, and appointed a successor in his place. *Quo warranto* proceedings were brought against the appointee. The Constitution of Illinois not giving express power to the Governor to remove the Secretary of State and appoint a successor, the court held that he had no such power. The court held the distributing clause gave no power to the Governor. The clause "The executive power of the State shall be vested in a Governor" was also held to confer no specific power, on the ground that "it has been settled by the Supreme Court of the United States that an enumeration of the

tence of that Article, and the one herein accepted, is that it declares that, with reference to such enumerated powers, the President is a coordinate and independent "department" of the government.

powers operates as a limitation and restriction of a general grant." The deduction of the claimed power from the Governor's duty to see that the laws are faithfully executed "has neither the sanction of authority nor the practice of other State executives, both of which are opposed to it." The governor having no authority to direct this constitutional officer in the exercise of his statutory duties, "he certainly has no power to dismiss him for not conforming to his directions." If, said the court, this officer holds at the will of the appointing power, then the Senate must consent to his removal, since the Senate must consent to his appointment. As to the assumption that the power of removal was, "as an undeniable proposition," an executive function, the court said the Constitution was the only source of his powers: "neither the practice nor the maxims of government can confer upon him any functions or powers." The federal analogy was dismissed, on the grounds that state precedents were more apropos, and that the President had a general power to appoint all superior officers of the federal government, whereas the Governor could appoint only a Secretary of State and his staff officers. "Whatever may be the theoretical or political denomination of this power [of appointment] under other governments it cannot be considered an executive function under our Constitution, because it does not belong to the executive." The people, the legislature and the judiciary appointed several hundred times as many as the Governor. No general rule could be deduced from state practice as to the power of appointment. "Unlike the Constitution of the United States, ours has created other executive officers, in whom a portion of this power is required to be vested by law, not to be assigned by the Governor." The Secretary of State "looks to the law for his authorities and duties, and not to the Governor, and to that, and that alone, he is responsible for their performance." "By an examination of the debates of 1789, it will be seen that the concession to the President, of the power now claimed by the Governor, was made for reasons which cannot apply to it [the instant case]."

See also Goodnow, *Principles of the Administrative Law of the United States*, pp. 40-41, 98-103, 116-118, 311-315, on the powers of appointment and removal in the states. See especially the cases cited

However, the Chief Justice claims, not without some authority, that this sentence vests in the President some supposed range of power known as "the executive power," which includes the power of executing the laws as well as the thereafter enumerated special powers. Let us examine this position.

in note 4 on p. 40, and in note 2 on p. 41. Cf. *Ex parte* Homes (12 Vt. 631, 635). "The state senate," says President Goodnow at p. 117, "not only [as per the system of 1905] exercises a wide control over the governor's appointments, it exercises also almost as extensive a control over the exercise of such powers of removal as he possesses."

We have given only passing attention to state practice and decisions, however, because they can be "distinguished" on the ground that the grant of the executive power, and the duty to see that laws are faithfully executed, must both be read in the light of: (1) the existence of *other constitutional executive officers in the states*; (2) the fact that provisions as to appointments and removals in *matters of local government* are related to a problem where the separation of powers as provided for the central state government is not strictly applicable; (3) the fact that anomalies in state practice are often due to *early practice* that goes behind the adoption of the Revolutionary distributing clauses and is therefore *taken as assumed* by them; (4) the fact that the first state constitutions did not make an adequate distribution of powers, but combined *general* distributing clauses with *specific* provisions that made for "legislative supremacy" (see Holcombe, *State Government* [revised, 1926], chaps. II and V), and that enlarged legislative competence survived the re-distribution of powers that followed later; (5) the fact that the state systems were based upon an extreme fear of the executive, whereas the federal Constitution resulted from a movement one phase of which represented the desire to establish a strong executive. This last point does not absolutely preclude our position that the Myers opinion establishes too concentrated an executive department. And we may reasonably suggest that the then existing state practice, coupled with the statement in No. 77 of the *Federalist* that the Senate could check removals, may well have kept "We the people" from intending to "ordain and establish" a President as powerful as the Chief Justice would have him.

This general power of executing the laws is a mere phrase until Congress acts to give it content.²⁷ Hence, the power of executing the laws cannot be vested in the President in the same sense in which his independent special powers—the content of which the Constitution defines and the courts determine, without Congress's having any power in the premises—are vested in him. A contentless power cannot be “vested” by a written constitution. The power of executing the laws is not a single power at all, but a generalized description of a varying series of powers created from time to time by statute. On the side of content, then, the President cannot be, in this connection, coordinate with Congress, as he is with respect to his special powers. By definition and the practice of our system in action, the power of executing the laws cannot be coordinate with the power of making the laws. On the side of content, the one is subordinate to—a mere creature of—the other. To this extent the metaphysic of the separation of powers breaks down, as involving the inconsistency of raising a power created by another power to a position coordinate with that other. The President could be coordinate in regard to general law-execution, in the same sense in which he is coordinate in regard to his enumerated constitutional

²⁷ Otherwise, Congress would have merely to lay down substantive rules governing societal relations, and the President could, without any grant from Congress of powers of execution, proceed to enforce these rules under the blanket statement of the opening sentence of Article II. This is not the way our system works in practice.

powers, only if he derived from the Constitution a sphere of independent discretion.

Nor can the opening sentence of Article II even be held to vest in the President the power of executing in the laws—when once its content has been determined by Congress—in the same sense in which his independent special powers are vested in him. For the President may personally exercise the latter, whereas the former is not only created by Congress, but is “vested” by it in such officers as it may see fit. The President may not personally exercise the powers of the Interstate Commerce Commission or of the Attorney General. A power is “vested” in an officer in a very peculiar sense when that officer may not personally exercise it. Nor may the President, in some cases at least, override or revise the decision of the officer. In fact, the Chief Justice admits that the President may not “properly influence” the decisions of certain quasi-judicial commissions. This narrows the meaning of the word “vest” still further. Let us quote the Myers opinion:

Of course there may be duties so peculiarly and specifically committed to the discretion of a particular officer as to raise a question whether the President may overrule or revise the officer's interpretation of his statutory duty in a particular instance. Then there may be duties of a quasi judicial character imposed on executive officers and members of executive tribunals whose decisions after hearing affect interests of individuals, the discharge of which the President can not in a particular case properly influence or control. But even in such a case he may consider the decision after its rendition as a

reason for removing the officer, on the ground that the discretion entrusted to that officer by statute has not been on the whole intelligently or wisely exercised. Otherwise he does not discharge his own constitutional duty to see that the laws be faithfully executed. . . .²⁸

This position denies the President, in some cases not clearly defined, the power to exercise personally,²⁹ overrule, or revise the decisions "committed" to (i. e., by Congress vested in) other executive officers, although, by the Chief Justice's original premise, these decisions are in the exercise of power vested in the President by the Constitution.

Furthermore, this position denies the President, in the case of quasi-judicial bodies, even the power "properly" to "influence" decisions taken in connection with power which, by the original premise, is vested in the President by the Constitution; while in the next breath the premise that the powers do "belong" to the President is appealed to as a source of his illimitable power to remove members of such bodies at pleasure. Not only does this give a very attenuated meaning to the term "vest," but it involves a denial of the correlative relation³⁰ of the power of removal and the power of administrative supervision—which is both absurd psychology and absurd law.³¹

²⁸ *Myers v. United States* (272 U. S. 52), at pp. 173-174 of 71 L. ed.

²⁹ By clear implication.

³⁰ This correlative relation is discussed below.

³¹ This was discussed in chap. II above. Further light is thrown upon the subject in chap. IV above.

The reason the Chief Justice takes this position is plain. It is the obvious reason that, in practice, it is considered that when Congress delegates a statutory executive power unrelated to the special constitutional powers of the President to a particular officer, the power can be validly exercised only by an official act of that officer.³² The President cannot exercise the power himself, or revise the act whereby the officer performed it. Else Andrew Jackson would personally have issued the order for the "removal" of bank deposits instead of informally dictating that the Secretary of the Treasury do so, and using the indirect method of removing Secretaries until he got one who would.

In effect, then, the Chief Justice holds that the opening sentence of Article II "vests" the "whole" executive power in the President, including the power of executing the laws as well as the special enumerated powers; but he then proceeds to give to the term "vest," in regard to the former phase of executive power, a very attenuated meaning, and one quite different from the meaning in regard to the latter phase. On dialectical grounds, the Chief Justice gives no more acceptable an interpretation of this elusive sentence than does this treatise. We narrow the content of the expression "the executive power" by reading: "The execu-

³² No President would for a moment think of personally rendering a decision on railroad rates or even of performing personally (say) certain powers "vested" by law in the Secretary of the Treasury.

tive power [in the sense of the specific powers hereinafter enumerated] shall be vested in a President [who is hereby, with respect to them, made coordinate with Congress, and hence cannot be controlled by statute].” The Chief Justice twists the meaning of the term “vest” by reading: “The executive power [as a whole, including the power of executing the laws as well as the specific powers hereinafter enumerated] shall be vested in a President [in the sense, in the former case, that he shall have an illimitable power to remove at pleasure all his appointees who exercise such powers, although he may not personally exercise such powers when committed specially to other officers, or overrule or revise their decisions, or in some cases even properly influence their decisions; but in the sense, in the latter case, that the powers as judicially defined are to be personally exercised by him or under his control].”

The dialectical contortions involved in the position of the Chief Justice neutralize any weight that might be given to the oft-repeated distinction in wording between the opening sentence of Article I on the one hand and the opening sentences of Articles II and III on the other.³³ This distinction, in-

³³ Cf. *Kansas v. Colorado* (206 U. S. 46, 81-83), and Corwin, *The President's Control of Foreign Relations*, index, under “Executive Power.” The language of Mr. Justice Brewer in this case is not necessary to the decision, however, and was apparently not meant to be as broad as, taken from its context, it appears. Perhaps this difference in wording may justify the contention that the lack of an omnibus clause in Articles II and III does not mean that the powers therein granted are to be strictly construed.

deed, may possibly be explained on other grounds.³⁴

Aside from dialectical difficulties—where we claim expediency should dictate our choice, especially in view of the fact that the framers were not themselves clear on the point—and aside from the absurdity of denying that the power of removal at pleasure involves the correlative power to “influence” the exercise of discretion, except in so far as purely extra-legal restraints operate, this position of the Chief Justice is not untenable. It may

³⁴ Against our interpretation is brought the difference in wording between “all legislative powers herein granted” and “the executive power” and “the judicial power of the United States.” This difference is easily explained on other grounds. It was precisely *because* the framers realized that the primary infringement on states’ rights came through the originating, willing power—the legislative power—that they carefully stated that only such powers as were “herein granted” were given to Congress. This meant precisely and only that the states reserved the rest of the “willing power” to themselves.

The judicial power was a limitation also, of course, but the Constitution could not say “all judicial powers herein granted,” *because* it did not directly vest such powers in the federal courts. It merely expressed the scope to which they should “extend,” leaving to Congress the power to vest in the courts it should create exclusive or concurrent jurisdiction over these classes of cases. Hence the wording “the judicial power of the United States” means the judicial power as vested, within this maxim scope, by Congress. And later it is merely stated that “the judicial power shall extend” to this maximum scope.

It was possibly *because* the executive power, being relative to the legislative will, merely incidental thereto, was not considered a subtraction from state power, that the framers described it in general terms as “the executive power.” Our present difficulties, it may as well be confessed, are due to the fact that the framers did not think the problem through to explicit conclusions. Hence, the possible *explanation* of their phraseology just given should not be held to refute our *interpretation* of that phraseology. See note 39 below.

reasonably be put as follows: Since the framers did not reason the matter out in accordance with the above logic, yet did verbally vest the whole executive power in the President, they may reasonably be held to have meant thereby to vest in the President administrative control over the discretionary exercise of all executive powers, even while they meant to allow Congress to define the content of the general powers of law execution and vest the "exercise" of such powers in particular officers set up by law. This is a plausible inference of intent. There is doubtless evidence which supports it. For the sake of argument, let us grant that the weight of evidence is on its side. Yet the fact remains that it is impossible to prove this was the actual intent, as the debate of 1789 shows.³³ This being so, we may reject this interpretation in favor of one which is consistent with a clear and important public policy. Here is a clear case where the "sociological method" must be applied—where it is the only intelligent method to employ.

The interpretation to which this method leads is that the opening sentence of Article II vests only the special executive powers that follow (or those reasonably implied therefrom)³⁴ in the President. In the exercise of the discretion thus literally "vested" in him, the President is coordinate with

³³ See chap. VI above, section on "The Legislative Decision of 1789."

³⁴ We shall later show that the express and implied constitutional powers of the President do not stand on precisely the same footing.

Congress. Congress may not interfere with or infringe upon such discretion. This means that it may not narrow its scope nor seek to devolve it upon others.

But the opening sentence of Article II does not vest the "power of executing the laws" in the President. This power is defined by Congress and "vested" by Congress in such executive officers as Congress sees fit.³⁷ Congress derives this power from its power to create offices and its power to make all laws necessary and proper for carrying into execution its own enumerated powers. No such laws violate the opening sentence of Article II, as by us interpreted, unless they "infringe" upon the specific constitutional powers of the President. With this proviso, the executive power in the sense of "executing the laws" is, in all its aspects, completely a product of the legislative will.³⁸

But Congress is also empowered to enact all laws necessary and proper for carrying into execution the powers vested by the Constitution in the President. This gives it power to create offices and enact any rules of "administrative legislation" which

³⁷ This is a statement of actual governmental practice from the beginning of the government. The only debatable point is whether the President's power of removal is conditioned upon legislative acquiescence or not.

³⁸ We thus accept the *subordination* of the executive to the legislative will—a subordination required by accepted definitions of terms—for the power of executing the laws, while accepting the *coordinate* relation of the two branches relative to the expressly granted *specific* powers which the Constitution gives the President for his own discretionary exercise.

do not infringe upon, but merely aid the exercise of such presidential discretion by the President or under his immediate control.

From its enumerated powers Congress thus derives plenary power of "administrative legislation" with respect to both major phases of executive power, except that it may not narrow the discretion involved in the specific constitutional executive powers of the President, nor devolve such discretion upon other officers. We shall proceed to show that it does neither when it regulates by statute the tenure of officers vested solely with statutory executive powers unrelated to these specific constitutional powers of the President. We shall explain how the powers *implied* from the latter may, when read in the light of the relevant powers of Congress, be held to be conditional, not absolute (illimitable), as is the case with the *enumerated* presidential powers. And we shall attempt to show that "administrative legislation" relative to tenure is permissible when an "aid" to, rather than an "interference" with, the express constitutional powers of the President.

Does the Opening Sentence of Article II Vest in the President the Power of Removal as a Specific Power Which Is "Executive" ex vi termini or by "Intent" of the Framers? Another mode of deducing an illimitable power of supervision and removal is secured by claiming that the term "the executive power," as used in Article II, first sentence, includes a "bundle" of specific powers in ad-

dition to those thereafter named. Are there any such specific powers which *ex vi termini* or by "intent of the framers" are to be included as such in "the executive power"?

Even if the framers, as eighteenth century men, had a vague idea that the verbal symbols "the executive power" included some specific and known (or discoverable) "bundle of powers," there is no evidence to show that they formulated such a list in their own minds, and certainly no record of such a list as formulated by any one of them.

In fact, there is evidence to indicate the contrary. In the Philadelphia Convention James Wilson said: "He did consider the Prerogatives of the British Monarch as a proper guide in defining the Executive powers. Some of the prerogatives were of a Legislative nature. Among others that of war & peace &c."

He continued: "The only powers he conceived strictly Executive were those of executing the laws,³¹ and appointing officers not (appertaining to and) appointed by the Legislature."

³¹ Clearly, Wilson's idea that "the executive power" is *par excellence* the power of "executing the laws" may be used to refute our contention that the latter is not "vested" in the President. But if it is so vested in the sense claimed by the Chief Justice, then it implies at best only the power of removal as the sanction of administrative supervision. Yet the debate of 1789 shows that the framers were not clear as to whether they were giving that power or not, certainly as to whether they were giving it as an illimitable power. So we get back again to the lack of clear intent on the part of the framers, and the conclusion that the only intelligent procedure is a *choice* that will conform to our conclusions on public policy.

It is also recorded that Madison "agrees with Wilson in his definition of executive powers—executive powers *ex vi termini*, do not include the Rights of war & peace &c. but the powers shd. be *confined and defined*." ⁴⁰

We hold that the specific "executive powers" were both "confined" and "defined" in the body of Article II. The opening sentence vests in the President only these, and such others as may be inferred as conditionally or absolutely implied in them, in the light of all relevant clauses of the instrument.

The alternative view is not only unsupported by evidence, except that relating to removals, but has evidence against it.⁴¹ Besides, it is dangerous. For to say that the sentence is a "grant of specific powers," but that what powers are granted is unknown, is simply to say that it is a "peg" upon which "interpretation" may hang or refuse to hang a specific power. The question what powers are "granted" is answered, as occasion arises, by making the concept include what is read into it. Then the "meaning" is drawn out of the concept again. But this obviously involves a choice by the interpreter. Houdini drew rabbits or guinea-pigs out of his hat accordingly as he had first put rabbits or guinea-pigs into it. The term "the executive power" becomes an "empty hat" into which the Court may read its prejudices on the subject.

⁴⁰ Farrand, *Records of the Federal Convention*, I, 65-66, 70. Italics are writer's.

⁴¹ See the reference in note 39.

Similarly, to say that the term "the executive power" includes a "bundle" of specific powers which are *ex vi termini* "executive," is to take an untenable position. The criterion of what constitutes an *ex vi termini* executive power is lacking. The powers in the Revolutionary states differed from the British prerogative as well as among themselves. The prerogative *in toto* (even as limited in the body of Article II) cannot be held to be included in "the executive power."⁴² Neither is there any ground for holding this supposed bundle of specific powers to be the equivalent of those of any single state.

Terms do not of themselves have "intrinsic" meaning.⁴³ By usage they acquire a sort of connotation or potential meaning. But this can never tell the meaning apart from the context and the particular situation upon which the term in its context is brought to bear.⁴⁴ And where usage varies, only arbitrary choice by an interpreter could give such a list of *ex vi termini* executive powers. Furthermore, Wilson expressly stated that only the power of executing the laws and the power of appointment were "strictly executive."⁴⁵

We thus reject this "basis" for inferring specific powers also, as not supported by evidence of "intent," and highly inexpedient.

⁴² See note 39, and Hart, *op. cit.*, pp. 115-116.

⁴³ "In themselves" terms are mere sounds or marks on paper.

⁴⁴ Ogden and Richards, *The Meaning of Meaning*, p. iii, chap. VI, and *passim*.

⁴⁵ See note 39. We assume that here Wilson expressed the common opinion of the framers.

But what, in particular, of the power of removal as a specific executive power vested in the President by the opening sentence of Article II? The Chief Justice quotes opinions of debaters in the Congress of 1789. Some of these opinions no doubt so regarded the power, notably the opinion of Ellsworth already quoted.⁴⁶ Some of them, however, are rather in line with the phase of the subject covered by the last preceding section of this chapter, by which the power of removal is regarded as the "sanction" of the power of "administrative supervision."

Against these opinions, we have the fact that it cannot be proved to have been the actual intent of the framers that the removal power is, as a specific power, included in "the executive power" vested in the President, as both their failure to enumerate it and the debate of 1789 show; "the fact that James Wilson did not include it as a specific power "strictly" executive in character;⁴⁷ and the fact that few if any other specific powers have been deduced from the opening sentence of Article II taken alone.⁴⁸ The main problem, as the last-mentioned fact clearly indicates, is the power of removal considered as the correlative of the power of super-

⁴⁶ *Macloy's Journal*, p. 114.

⁴⁷ See above, chap. VI, section on that debate.

⁴⁸ See note 39 above.

⁴⁹ Story suggests that the power to grant exequaturs to consuls "may be fairly inferred from other parts of the constitution, and indeed seems a general incident to the executive authority." *Commentaries*, § 1559. We hold that this should be taken in the same sense as Jefferson's remark cited below in note 91.

vision over the "execution of the laws," which in the last section we held not to be "vested" in the President by this much-disputed sentence.

A Fundamental Postulate. From the above considerations we derive a fundamental postulate which marks the primary difference between our point of view and that of the Chief Justice and those who go along with him.⁵⁰ It is the postulate that, by virtue of the definitions of the three main classes of governmental powers, the legislative power stands to the executive power in the relation of the originating will to the mere carrying out of that will, both as regards the functional and as regards the institutional aspects of administration. We recognize that the position of the President, by way of special exception, is made coordinate with that of Congress with regard to the enumeration of special spheres of "executive" discretion contained in the body of Article II. But we hold that Article II itself, especially in regard to its opening sentence and the powers *implied* from those enumerated in sections 2 and 3, is to be read in the light of the primary postulate of legislative supremacy.⁵¹ The "presidential" system of our Constitution merely modifies that postulate to the extent to which it subtracts

⁵⁰ In this problem it becomes *necessary* to begin with the point of view of Congress or with that of the President. This starting point determines, in the last analysis, the conclusions that are arrived at.

⁵¹ We have shown above that, with regard to statutory executive duties, legislative supremacy is the actual practice, unless an exception is to be made with regard to removals, the subject at issue.

from the plenary ⁵² legislative discretion of Congress certain spheres of discretion for the independent exercise of the Chief Magistrate.

Distinction Between Two Classes of Governmental Acts. We distinguish the act of removing from office, and the act of laying down rules to govern the conditions of tenure of office and the causes and modes of performing the act of removing. This gives us two classes of powers, the power to perform the act of removing, or the power of removal, and the power to enact rules to govern the above-mentioned subjects. Failure to bear in mind this obvious distinction has led to much confusion of thought.

The Power of Removal is Executive and the Power to Regulate Tenure and Removals is Legislative. Under the general principle of the separation of powers,⁵³ the power of removal conforms to the general conception of an executive power, and the power to regulate tenure of office and removals to the general conception of a legislative power. The act of removal is a particular act connected with special executive powers or with law-execution; the act of laying down rules governing tenure and removals is the prescription of a general principle of administrative organization which fixes the conditions of future law-execution, but is not itself in execution of any law.⁵⁴

⁵² Within the range of federal power, of course.

⁵³ Goodnow, *Principles of the Administrative Law of the United States*, chap. IV.

⁵⁴ We assume that it is permissible to classify a particular governmental act in this fashion, and that this classification will be generally accepted.

The Immediate Implications of this Classification. From the above distinction and the classification based upon it there are deducible certain inferences. It is essential to make clear that these differ for the two acts; and that there are certain inferences which may not properly be drawn.

If an act is classed as legislative, it does not necessarily follow that it belongs to Congress. The national legislature is a body of limited legislative powers; and hence the question still remains—and in this case will soon be considered—whether the power is expressly or impliedly assigned by the Constitution. But it does immediately follow from such classification that, in general, Congress is the only body in which it can be held to be located;⁵⁵ and, further, that the text of the Constitution is the only source from which Congress can be held to derive the power. It can be delegated no powers by the President or the courts. In short, it belongs to Congress if, and only if, it is expressly or by inference assigned to Congress by the fundamental law, the sole source of congressional powers.

On the other hand, if an act is classed as executive, while it follows immediately that executive officers are the only officers in whom it can be held to be located,⁵⁶ it does not follow either that the

⁵⁵ For all federal legislative power is vested by the Constitution *immediately* in Congress.

⁵⁶ The delegation of "all legislative powers herein granted" to Congress implies the inability of Congress itself to exercise executive powers. *Expressio unius est exclusio alterius.*

power belongs to the President directly from the Constitution, or that the text of the Constitution is the sole source from which an executive officer may derive it.

The explanation of this difference in the inferences of the two cases lies primarily in the fact pointed out above: that while the Constitution is the sole source of congressional powers, it is not the sole source of executive powers. The latter are in part derived from the Constitution, in part from statutory provisions.⁵⁷ Hence, merely to class a power as executive does not answer the question whether it is vested in the President by Article II, or whether it is for Congress to vest it or not, in its discretion, in executive officers. This fact that from the beginning of our government the statutes have been a source of executive powers suggests the conclusion already postulated, that Article II vests in the President only a limited number of the powers to be classed as executive, whereas others that fall in this class are vested by Congress in the President or in executive officers created by Congress for the purpose. It is thus a fact of government in action, from a time contemporaneous with the adoption of the Constitution, that, while legislative initiative

⁵⁷ The veto power is vested directly in the President by the Constitution; but there is no power of executing the customs laws unless and until such powers are created and defined by Congress, and vested by it in such officers as it may see fit. At any rate, Congress may define the powers connected with customs collection in as much detail as it sees fit, and assign such powers to such officers as it may see fit to create for the purpose.

is not required in the case of certain executive powers, Congress is the originating source of other executive powers. Hence, to class a power as executive means no more than to say that it must be located in executive officers.⁵⁸ Whether it is so located by the Constitution or is brought into existence only by statute is still to be determined.

The Power of Removal Is Executive in the Sense That It Can Be Inferred to Reside In, or Be Conferred by Statute Upon Executive Officers Only. This principle, then, is all that we infer when we tag the power of removal as "executive." If the power is inferred directly from the Constitution, it must be inferred as belonging to the President, in whom are vested all constitutionally granted executive powers. If it may be conferred by statutory rules, it must be conferred upon "executive" officers only. This deduction from the separation of powers may be overcome only by special exceptions drawn as inferences from express relevant clauses of the Constitution.

This Prima Facie Principle Supported by the Myers Decision. The *prima facie* case thus presented against the location of a power of removal, by constitutional inference or by statute, in other than "executive" officers, finds support in the Myers decision.⁵⁹ In that case the Supreme Court in effect held that the Constitution forbids Congress to vest

⁵⁸ See note 56 above.

⁵⁹ See chap. V above.

in the Senate, a "legislative" organ, a "share" in the "executive" act of removal, and that despite the fact that the Senate is expressly granted by the Constitution a "share" in the power of appointment. By similar reasoning, Congress cannot take to itself the power of removal, as it attempted to do in the case of the Comptroller General.⁶⁰ Likewise, the Congress of 1789 recognized that the Senate has no constitutional share in removals, and based its inference upon this very principle.⁶¹

The Power of Removal Is the Correlative of the Power of Administrative Supervision. Not only is the power to perform the act of removal a power to be located in "executive" officers, but it is the correlative of the power of administrative supervision. That is, if one executive officer is given the power to remove another at pleasure, this involves the establishment of the relation of administrative superior and administrative inferior as between them, and hence carries with it the power, on the part of the officer authorized to remove, to exercise administrative supervision over the other. Conversely, if one officer is clearly made, by express terms or by implication, the administrative superior of another, this involves a power on his part to remove at pleasure his administrative inferior. Hence, if there is no express provision for removals, the

⁶⁰ See chap. III above, section entitled "The General Accounting Office."

⁶¹ See Thach, *Creation of the Presidency*, chap. VI.

power to remove at pleasure is implied as the correlative of the power of administrative supervision.⁶²

If a statute seeks to divorce this correlation, by making an independent officer the administrative inferior of another officer, either the independent tenure stands and the provision for administrative control becomes meaningless, or else the administrative relationship remains, but the provision for tenure is unconstitutional. We shall see that the former is the case where Congress is legislating with reference to the execution of its own enumerated powers which are not related to the constitutional powers of the President; but that the latter is the case where it is legislating with reference to the execution of the constitutional powers of the President.

It should be added that by administrative control we mean merely the power to dictate how the discretion vested in the inferior officer shall be exercised, or the power of the superior officer to devolve upon the inferior officer discretion vested in the superior, except where such discretion must be personally exercised by the superior.⁶³

That these two powers are properly to be considered as correlatives is seen in the absurdity of attempting to give independence of action to an officer removable by another,⁶⁴ as well as in the ab-

⁶² This is a major assumption which is in conformity with common-sense psychology. See chap. II above.

⁶³ Cf. Hart, *op. cit.*, chap. VIII.

⁶⁴ Cf. chaps. II and IV above.

surdity of seeking to make one officer responsible to another without giving the latter the power to remove.⁶⁵

It has often been asserted that in 1787 the framers thought of the Presidency in terms of "political" rather than of "administrative" powers. It was once thought that modern administration had not then developed to the point of making this correlation clear and important. Professor Thach, in *The Creation of the Presidency*, has shown that the framers had a rather clear idea of administration and of the administrative relationship.⁶⁶ He thus holds erroneous, upon the basis of a careful study of contemporaneous evidence, "the commonly accepted explanation that the presidential control over administration is an accidental result of the possession of the power of removal. The exact reverse is the true explanation. The power of removal was [in 1789] rather derived from the general executive power of administrative control."⁶⁷ And, even

⁶⁵ We shall make this the basis for our contention that if Congress sets up an officer bearing the relation to the President now borne by the Secretaries of State, of War, and of the Navy, in relation to his *constitutional* executive powers, Congress may not limit his power to remove them at pleasure.

⁶⁶ Thach, *Creation of the Presidency*, passim. The present writer cannot agree that, in the light of the debate of 1789 on removals, the fathers must, as a *legal conclusion*, be held to have included a denial of the power to Congress to regulate tenure and removals. See chap. VI above. Whatever the historian's judgment, the constitutional lawyer still has room to hold that no "intent" in this matter can be *proved so conclusively* as to outweigh well-reasoned conclusions of present-day public policy.

⁶⁷ Ibid., pp. 158-159.

while admitting that the Constitutional Convention debates give no final answer, he finds even there that, "as to the administrative headship of the President," these debates furnish "evidence enough to upset the interpretation usually given that this silence of the Constitution indicates a complete failure to envisage the President in such a capacity, and enough to forecast the decision [of 1789] which would, in due time, be given it."⁸⁸ Hence, it is not unhistorical to regard the power of removal as being implied as a correlative in such conclusions as we may deduce from the text as to the location by the Constitution, or the power of Congress to provide for the location, of the power of administrative control.

This idea of the power to remove as a correlative of the authority to supervise is not inconsistent with a proper understanding of the oft-repeated formula that the power is implied in the power of appointment. For is not the latter formula a short-hand way of saying that the power of appointment is evidence of the intent as to the power of control? What we add is that it is conclusive evidence thereof only in the absence of other relevant evidence. We shall show that the Constitution contains other evidence, so far as the President is concerned, which must also be taken into account in drawing our inferences.⁸⁹

⁸⁸ Ibid., p. 141.

⁸⁹ In the case of the President, other relevant constitutional provisions are the faithful execution duty and the vesting of specific

Some Immediate Consequences Relative to the Appointing Power as a Supposed Source of an Absolute Power of Removal. We shall accordingly derive the President's power of administrative supervision (which involves the correlative power of removal) from more than one presidential power, not from the power of appointment alone. Some immediate consequences are apparent. The first is that the Senate, which does not participate in these other powers, except in the case of only one of those connected with foreign relations (treaty making), is thereby precluded from participation in removals. This preclusion of the Senate is effected without resort to the strained interpretation whereby the power to appoint is distinguished from the power to advise and consent to appointments, and the power of removal deduced from the former only.⁷⁰ For if the power to remove is necessarily involved in the power to appoint, why is not the power to advise and consent to removals necessarily involved in the power to advise and consent to appointments? In short, why does the one not involve the other, with the same "checks," unless other factors, as we hold, come into play in the case of removals?

constitutional powers in the President. But in the case of department heads vested by law with the power of appointment, there are no such additional *constitutional* evidences. The power of appointment, together perhaps with the powers vested by Congress in the superior officer, may here be conclusive of an intent to vest a power of supervision and of removal.

⁷⁰ As per the opinion in *Myers v. United States* (272 U. S. 52).

A second consequence is that these other factors, later to be considered, must be taken into account in inferring whether and when the President has an absolute or conditional power of removal.

The Power to Create Offices. We have seen that, in general character, the power to regulate the tenure of an officer, and the conditions and modes of his removal (if any), is "legislative." It is not prevented from being such merely because it lays down rules concerning the exercise of executive power, since, as we have also seen, Congress may sometimes do this.⁷¹ We have also seen that, as a legislative power, it must belong to Congress, if to any organ, and that it is attributable to Congress only if derived from the powers delegated that body in the Constitution.

A "basis" for assigning the power to Congress is the power to create offices. The Constitution provides for appointments to offices "which shall be established by law."⁷² It thus grants power to Congress to create offices. All executive offices except the Presidency⁷³ are brought into being by statute. In the Myers opinion the Chief Justice himself ad-

⁷¹ It does this every time it defines the powers of execution of the officers set up to carry out the substantive rules which it enacts to govern societal relations. The reader will find *Little v. Barreme* (2 Cr. 170) interesting in this connection. See especially the part of the opinion quoted in Hart, *Ordinance Making Powers of the President*, pp. 309-310.

⁷² Article II, sec. 2, par. 2.

⁷³ And, of course, the Vice-Presidency—if this can be called an "executive" office. Cf. Wilson, *Congressional Government*, pp. 240-241.

mits that this involves the power to prescribe the following:

1. Qualifications for office, "provided, of course, that the qualifications do not so limit selection and so trench upon executive choice as to be in effect legislative designation."

2. The term, or period beyond which the incumbent may not hold without reappointment by the President.

3. Reasonable classifications for promotion.

4. The duties attached to the office.

5. The compensation.⁷⁴

All of these constitute "parts" of the office that is created. The "office," in fact, is a concept which summarizes these and similar rules—a peg upon which such rules are hung. The rule that an incumbent shall be removed only for cause and after a hearing is a "part" of the "office" in the same general sense as the rule prescribing qualifications for office. The one limits the administrative superior in his control, the other narrows the range of choice of the appointing power. A rule that the incumbent shall hold office for a minimum period is likewise a "part" of the office in the same general sense as a rule that he may not hold beyond a maximum period. The former, to be sure, goes further than the prescription of qualifications, in that it does not merely limit a power, but prohibits its exercise. But the power of appointment is an express power,

⁷⁴ 272 U. S. 52, at p. 171 of 71 L. ed.

whereas there is no power of removal except by inference, and it is as possible to infer a conditional as an absolute power of removal. If the President's constitutional power of removal turns out to be conditioned upon statutory prescription of independence of tenure, then the power of Congress to regulate removals becomes broader than its power to limit the range of selection in the case of appointments.

Prima facie, the power to create offices carries with it the power to fix the tenure of the offices created and to determine whether or not two offices shall be related as administrative superior and inferior.

The Necessary and Proper Clause. This *prima facie* case for the validity of such statutes is strengthened—and in a sense limited—by the necessary and proper clause. The Constitution says that Congress shall have power “to make all laws which shall be necessary and proper *for carrying into execution* the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.”⁷⁵ It is well established that the words “necessary and proper” are to be taken in no narrow sense as “indispensable.” “Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist

⁷⁵ Article I, sec. 8, cl. 18. Italics are the writer's.

with the letter and spirit of the Constitution, are constitutional." ⁷⁶

The Purposes for Which Congress May Create Offices. The Constitution thus authorizes Congress to establish such offices as are "necessary and proper" means "for carrying into execution" certain constitutionally vested powers. What powers? First, the foregoing enumerated powers.⁷⁷ Secondly, all powers vested in the federal government.⁷⁸ Thirdly, all powers vested in Congress other than the "foregoing" powers,⁷⁹ or in the federal courts,⁸⁰ or in the executive "department."⁸¹ Fourthly, all

⁷⁶ *McCulloch v. Maryland* (4 Wheat. 315). It is quite true that this case dealt with federal-state relations, not with legislative-executive relations. But the application here made of it is justified, if the "picture" which governs our interpretation be accepted. See earlier sections of this chapter. Fully realizing the historical and constitutional significance of setting up an *independent* executive with a range of discretion upon which the Congress may not "infringe," we nevertheless have held that the legislative will is, with this exception, supreme, even in respect to "administrative legislation." A contrary position is tenable, but is not necessary.

⁷⁷ Specifically, those set forth in Article I, sec. 8, cl. 1-17 inc.

⁷⁸ E. g., the obligations laid upon "the United States" in Article IV, sec. 4.

⁷⁹ E. g., the power to create offices, derived from Article II, sec. 2, par. 2; and the power to enact rules and regulations respecting the territory or other property of the United States, granted in Article IV, sec. 3, par. 2.

⁸⁰ From the inclusion in the judicial power of the United States of the power to hear all cases of admiralty and maritime jurisdiction is derived the power of Congress to enact substantive law for the courts to apply in such cases. See Willoughby on the Constitution, III, 1347-1349.

⁸¹ The inference seems to be that there are three "departments." All powers "vested" by this Constitution in the executive "department" are *concentrated* in the *President*. The other members of

powers specially vested in particular officers, such as the President⁸² or the Chief Justice.⁸³

For our purposes it is only necessary to point out that this "elastic clause" authorizes Congress, on the one hand, to enact all statutes necessary and proper for carrying into execution its own enumerated powers, and, on the other hand, to enact all statutes necessary and proper for carrying into execution the enumerated powers vested by the Constitution in the President.

In short, there are these two (besides other) purposes for which Congress may set up the offices it is expressly authorized to establish. One major purpose is to provide executive officers for carrying into execution the powers Congress is delegated by the Constitution; another is to provide executive officers for carrying into execution the specific powers vested in the President by the Constitution.

the "department" are clearly meant to be created by law. Such members of the executive "department" as have only powers and duties *vested by statute* are created as necessary and proper means of carrying into execution the enumerated powers of Congress *vested in it by the Constitution*. To these the clause "The executive power shall be vested in a President" does not apply, except in that it is taken to create a "department" in *some* members of which all power to perform acts of an "executive" nature must be vested.

⁸² E. g., the Department of State is created as a necessary and proper means of aiding the *President* in his *constitutionally* granted control of foreign relations.

⁸³ Presumably Congress may enact such laws as shall be "necessary and proper" for carrying into execution the power of the Chief Justice, granted in Article I, sec. 3, par. 6, to preside over the Senate when the President is tried on impeachment.

The Necessary and Proper Clause Gives Congress Plenary Power of Legislation Relative to All Federal Authority, Subject Only to Special Constitutional Provisions, Notably the Limitation That It May Not Infringe Upon the Constitutional Powers of the President. This clause authorizes Congress to pass all laws necessary and proper for carrying into execution all federal powers—those vested in Congress, those vested in the Courts, those vested in the President, those vested in any other officer, and those vested in the “United States,” as a government, by the Constitution. This expressly gives Congress plenary power to enact “administrative” as well as “legislative” rules within the entire range of federal authority, except as particular laws may not be “proper” in view of other constitutional provisions. For our purposes the only relevant provision is the opening sentence of Article II, which vests the thereafter named executive powers in the President, together with such others as may reasonably be implied from these in the light of all relevant clauses of the document.⁸⁴ What presumptions are thus set up will be explained later. We mean here merely to emphasize the fact that the necessary and proper clause makes Congress the custodian of the “will” of the federal government, as a primary principle in harmony with the idea that legislative power is willing power, to which all other powers are,

⁸⁴ Willoughby on the Constitution, I, 65 (“The Constitution to be Construed as a Whole”).

unless special exception is made, subordinate by definition. The necessary and proper clause itself indicates that from this plenary "willing" power are subtracted certain discretionary powers which are vested in other departments or officers.⁸⁵ A statute which "infringed" upon these would not be "proper." But aside from this proviso,⁸⁶ it makes Congress, by positive and all-inclusive language, the sole depository of the "willing" function of the federal government, and grants Congress plenary legislative authority over the whole range of federal power.

The Power to Create Offices and the Necessary and Proper Clause Enable Congress to Regulate the Tenure of All Executive Officers Whom It Creates, Provided It Does Not Thereby "Interfere" with the Constitutional Executive Powers of the President. We have seen that the power to create offices *prima facie* enables Congress to regulate their tenure. We have seen that Congress is authorized to set up such offices, and make all laws which may be necessary and proper for carrying into execution all constitutionally vested powers—the constitutional executive powers of the President

⁸⁵ Thus, it implies that there is a range of discretion vested in the President by the specific grants of Article II.

⁸⁶ The crucial question, of course, is the meaning assigned this proviso. We shall later assign it a meaning merely as one that is *tenable*, and to be chosen as the alternative leading to the most desirable consequences. If our conclusions on public policy are not accepted, then the reader is not asked to accept our constitutional theory.

as well as the legislative powers of Congress. This means that Congress may regulate the tenure of all officers whom it sets up, for whichever purpose it sets them up, provided only it does not thereby "infringe" upon any special constitutional power of the President.⁸⁷ It thus strengthens the presumption set up by the power to create offices. It does not imply that while Congress may regulate the tenure of officers set up for carrying into execution its own constitutional powers, it may not regulate the tenure of officers set up for carrying into execution the constitutional powers of the President. It gives a definite basis, rather, for the plenary power of "administrative legislation," except for the limitation noted.

It is obvious, of course, that this limitation is more apt to come into play where Congress is creating officers to carry into execution the powers with which it may not "interfere" than when it is creating offices to carry into execution its own constitutional powers that are unconnected with those of the President. Hence, what is "necessary and proper" in one case may not be in the other. In this sense the necessary and proper clause harmonizes with the

⁸⁷ This proviso follows from the conclusion that in respect to these constitutional powers the President is coordinate. That this is the *sole* limitation follows from the conclusion that, by definition, the power to make laws is the creative, willing function, the power to execute these laws subordinate, and actually *created by* the laws themselves. The President, as constitutional possessor of certain definite spheres of discretion, is coordinate with Congress. For the rest, the executive function is a creation of the statutes.

interpretation whereby the opening sentence of Article II makes the President coordinate in respect of his constitutional powers. To the extent that it must be interpreted in the light of that coordination, it is correct to say that the distinction between the purposes for which offices may be created has significance relative to the power of Congress to regulate tenure, and implies a limitation upon the power to create offices. But the fact remains that Congress may regulate the tenure even of officers set up for the purpose of carrying into execution constitutional presidential powers, if it thereby does not infringe upon such powers, but merely aids them. We shall see that Congress may vest statutory executive powers in permanent officials set up to aid the execution of presidential powers, but may not make independent officers upon whom it authorizes the President to devolve the discretion involved in such powers.

We mean, of course, to allow for other special limitations on the power of Congress as notably, that it may not, in regulating tenure, seek to take to itself the power of removal.⁸⁸ Such limitations cannot be repeated every time we refer to the limitations growing out of a particular relationship.

Constitutional Executive Powers of the President.

"The executive power shall be vested in a President of the United States. . . ."⁸⁹ This means, for

⁸⁸ See above.

⁸⁹ Opening sentence of Article II.

our present purpose, that the executive powers of constitutional origin are vested in a "single" executive. These consist of the express powers that follow in the clauses of Article II, and of such powers as may be implied from these express powers read in the light of all relevant clauses of the Constitution.⁸⁰ The very designation of the powers that follow as "executive" may be made an argument in implying such additional powers. Thus from certain express powers it results that the President is held to have full charge of foreign relations. This broad inference is in part justified by the fact that, historically, the conduct of foreign relations is "executive altogether."⁸¹ This is not the same thing, however, as saying that the opening sentence of Article II "vests" any powers in the President except those that follow or those reasonably implied from them.⁸²

The express constitutional powers of the President are enumerated in Article II. From these, read in their context as parts of the whole document, are derived the implied powers of the President. Among the chief of these are the powers to recognize foreign

⁸⁰ See note 84 above.

⁸¹ This is the statement of Thomas Jefferson, quoted in Corwin, *The President's Control of Foreign Relations*, p. 203.

⁸² The fact that a power was recognized in 1787-1789 as "executive altogether" makes it more plausible to infer it from the enumerated grants, since these are described in the opening sentence of Article II as "executive." This is what we meant above by saying that this sentence may be used as evidence to support an inference from the grants that follow. That is, however, very different from saying that the sentence is itself a source from which, taken by itself, powers are to be "deduced."

states and governments other than by "receiving" their ambassadors,⁹³ to grant exequaturs to consuls,⁹⁴ and in general to act as the sole medium of international intercourse, whether or not "treaties" are being "made."⁹⁵

This class of executive powers, then, whether express or implied, belongs to the President because they are vested in him directly by the Constitution. We may call them the constitutional executive powers of the President. And from the separation of powers it follows: (1) that these powers may be exercised by the President upon his own initiative, initiating measures of Congress not being required;⁹⁶ and (2) that, in general, Congress may not

⁹³ Mathews, *Conduct of American Foreign Relations*, chap. VII; Willoughby on the Constitution (2d ed., 1929), I, 536.

⁹⁴ Story, *Commentaries on the Constitution*, § 1559. See note 49 above.

⁹⁵ Taft, *Our Chief Magistrate and His Powers*, pp. 112-113.

⁹⁶ Practice leads to the conclusion that the President possesses these powers from the Constitution without the necessity of intervening legislation. Cf. Thach, *Creation of the Presidency*, chap. VII. We feel justified in quoting this excellent study in support of our positions, even though it has been used to refute the central position of this treatise. We agree that Professor Thach's conclusions point in the direction taken by the Chief Justice. But in refusing to follow all the way in that direction, we would again remind the reader that Professor Thach is writing as a historian, not as a constitutional lawyer. Compare the conclusions which Professor Corwin reaches after a review of the same evidence. *The President's Removal Power*, pp. 10 ff. Not only is Professor Corwin writing as a lawyer, but he is faced by the problem specifically at issue in this treatise. That is not the problem which was immediately before the Congress of 1789, nor was it immediately before Professor Thach in his interpretation of their action and opinions. Hence, their opinions are *dicta* with reference to this issue, namely, whether Congress may so

"interfere" with their exercise by the President personally or under his direct supervision and responsibility. If Congress attempts so to "interfere," then there arises what is probably the only situation in which the President is justified in refusing to obey a statute.⁹⁷ But we shall later show that what constitutes congressional "interference" is not so simple a question as it is often assumed to be.

Statutory Executive Powers.^{97a} Besides these executive powers vested in the President by the opening sentence of Article II, there are other executive powers which are neither defined by, nor directly derived from, the Constitution. They are vested in executive officers by statutes. Their content cannot be defined in any constitution. For they do not exist apart from the statutory regulation of particular

fix tenure as to restrict the power of removal at pleasure. What Madison would say today with reference to this issue is an inference. We even venture to suggest it is not a matter of certainty what the Supreme Court will decide when this issue is brought directly before it. The proper view, therefore, is that opinions expressed even by the highest authorities *ante litem motam* are to be discounted for that very reason. So critical an issue can only be finally settled by a court which is faced with the problem in all its acuteness, and is thus compelled to reflect upon the consequences of its choice of alternatives in a way no court does when it overgeneralizes.

⁹⁷ Cf. Willoughby on the Constitution, III, 1502-1504.

^{97a} Mr. Taft goes at least far enough in the direction of the views set forth in this section to make the conclusions which we draw seem reasonable, although he does not go all the way with us. See his work, *Our Chief Magistrate and His Powers*, chap. VI, especially p. 125. "Fixing the method in which Executive power shall be exercised is perhaps one of the chief functions of Congress . . . it often creates a duty in the Executive which did not before exist. Then in prescribing how that duty is to be carried out, it imposes restrictions that the Executive is bound to observe . . ."

subjects within the legislative competence of Congress. These executive powers may be called statutory executive powers. They come into being only if and when statutes are enacted laying down substantive rules. Their definition forms a part of the policy of such statutes. They are created, and vested in particular executive officers, by the "administrative provisions" of such statutes. Congressional enactment thus brings these executive powers into being, and fixes their scope and limitations. Congress must not place these powers in the courts or take them to itself. It must vest them either in the President or in officers created by statute for the purpose. To this end Congress is expressly authorized to make all laws necessary and proper for carrying into execution its own delegated powers of legislation. But not only such officers, but the President himself, when performing such executive functions, are authorized to act only within the limits set by statutory delegations.⁹⁸

⁹⁸ Hart, *op. cit.*, pp. 180-183. The case of *Little v. Barreme* (2 Cr. 170) is interesting in this connection. John Locke held the legislative to be the "supreme power" *in the sense* that it has the right to "make laws for all the parts, and every member of the society prescribing rules to their actions." The legislature is limited by the ends of civil government. Thus it cannot delegate its legislative power, and it must not "rule by extemporary arbitrary decrees," but must "dispense justice and decide the rights of the subject by promulgated standing laws, and known authorized judges." He referred to the legislative function as incidentally involving "giving power of execution where they [legislative rules governing society] are transgressed." "Allegiance" to a sovereign he describes as "being nothing but an obedience according to law, which, when he violates, he has no right to obedience, nor can claim it otherwise

This class of executive powers being vested by statute in such officers as Congress may designate, and not by the Constitution in the President as "the executive," we are clearly not dealing with the "independent" powers of the President as a "co-ordinate" branch of the government with which Congress may not "interfere." Rather are we dealing with a situation where, from the nature of the case, Congress is the "superior" organ, and the executive officers concerned its "agents."⁹⁹ There

than as the public person vested with the power of the law." Again, "he has no will, no power, but that of the law . . . the members [of society] owing no obedience but to the public will of the society." If he may, in England, "also be called supreme" "in a very tolerable sense," this is "because he has in him the supreme execution from whom all inferior magistrates derive all their several subordinate powers, or, at least, the greatest part of them"; and because, as a part of the legislature, his assent is necessary to subject him to parliament. And "the executive power placed anywhere but in a person that has also a share in the legislative is visibly subordinate and accountable to it, and may be at pleasure changed and displaced"; while "other ministerial and subordinate powers in a commonwealth . . . have no manner of authority, any of them, beyond what is by positive grant and commission delegated to them, and are all of them accountable to some other power in the commonwealth," presumably acting by delegation either from the Crown or from parliament. Thus the Crown's prerogative gave him in Locke's day a control over administration comparable to that urged by the Chief Justice. But assuming the President's powers to have been "confined" and "defined," as Madison said they should be, this part of Locke's statement is not in point. The significant thing is his recognition that legislation creates the "power of executing the law" so far as the private citizen is concerned. We add that the necessary and proper clause includes administrative legislation as well as the enactment of rules governing private conduct, and that the former includes regulation of tenure.

⁹⁹ As per our fundamental postulate set forth in the section above which bears that title.

is thus every presumption in favor of the power of Congress to regulate the tenure of all officers set up for the purpose of executing statutory executive powers. Congress is here less likely than when setting up officers for the other major purpose to "infringe" upon the President's specific powers.

The Executive "Department." We may at this point describe the executive "department" in action. It consists, first of all, of the President. Article II, in its opening sentence, "vests" in him, as a "single" or one-man Executive, his "constitutional" executive powers. These consist of those expressly thereafter enumerated, together with such other powers as are inferred from these express grants when read in the light of all relevant clauses of the Constitution.¹⁰⁰ In addition, the President has such statutory executive powers as Congress may "vest" in him.

Besides the President, the executive "department" consists entirely of officers created by statute. Some of these are created as necessary and proper means for carrying into execution the constitutional executive powers of the President. Others are set up as necessary and proper means for carrying into execution the statutory executive powers which Congress may see fit to "vest" in them. Some officers set up for the former purpose are given statutory executive powers as well.

¹⁰⁰ The differences, for our purposes, between the express and implied constitutional powers of the President will be pointed out in the two following sections.

In all cases, it is Congress and not the Constitution which vests in executive officers statutory executive powers. The opening sentence of Article II does not vest such powers, nor need it be held to vest control over them, in the President.¹⁰¹ Congress decides in what officers it will vest such powers; but by the opening sentences of Articles I and III it must vest them in non-legislative and non-judicial (and hence, by exclusion, in "executive") hands.

It is thus only in connection with the constitutionally vested powers of the President that the Constitution sets up a "single" executive.

The Constitutional Executive Powers of the President May be Either Exclusive or Concurrent, and Either Absolute or Conditional. We have said that the separation of powers prevents Congress from "interfering" with the constitutionally vested powers of the President. But it is important to note—and this is a clean illustration of the fact that the Constitution does not involve a perfectly simple three-fold pigeon-holing of powers—that what constitutes "interference" by Congress varies with different powers. An express or implied power may be either exclusive or concurrent, either absolute or conditional.¹⁰² In both cases, it is important to note, the power must be inferred, or, if it is an express power, must be "interpreted," in the light of the

¹⁰¹ See discussion of this subject in a preceding section of this chapter.

¹⁰² As we shall show in the next section, an express power can properly be held to be conditional only where it involves rule-making. Not so an implied power.

relevant powers of Congress. The "meaning" of express powers thus depends upon inference,¹⁰³ and the difference between express and implied powers becomes in large part a difference in the degree of boldness of the inference. Each power is, in actual practice, taken on its own merits.

The power of recognition is implied as an exclusive presidential power, which no other department has concurrent power to exercise, and also as an absolute power, not conditioned upon congressional prescription of rules.¹⁰⁴

The express power to issue pardons is, upon historical grounds, interpreted to "involve" the power to issue amnesties.¹⁰⁵ Without quibbling over whether the latter power is express or implied, we may note that, although the President derives it directly from the Constitution, Congress has been held to have an implied and concurrent power to do the same thing.¹⁰⁶

A somewhat different example of concurrent power exists where the express power of Congress to "make rules for the government and regulation of the land and naval forces"¹⁰⁷ overlaps the express power of the President to "be Commander-in-Chief of the Army and Navy."¹⁰⁸ There are certain

¹⁰³ For the meaning must be extracted from the verbal symbols in the light of other relevant clauses.

¹⁰⁴ Willoughby on the Constitution, I, 536.

¹⁰⁵ *Ibid.*, III, 1492.

¹⁰⁶ *Ibid.*, III, 1492-1493.

¹⁰⁷ Constitution, Article I, sec. 8, cl. 14.

¹⁰⁸ *Ibid.*, Article II, sec. 2.

rules which either may make.¹⁰⁸ But viewed from another angle, the express power of the President is *conditioned* upon the failure of Congress to exercise its express power so as to cover the field. That is, there are certain army and navy regulations which the President may issue only on condition Congress has not covered the subject.¹¹⁰

The President has exercised, under his general powers connected with foreign, military and naval affairs, the power to grant permits to land cables upon American soil.¹¹¹ But while the courts refused to recognize this power in the case of an American company which had already been regulated by Congress, it is barely possible that the power might be recognized relative to a foreign company, on the theory of congressional "acquiescence" in its exercise, or on the theory that it is a "political question." For our purposes the point is that, granted the power exists, it can scarcely be doubted that this implied power is conditional, in the sense that, unlike the absolute power of recognition, it is conditioned upon the power of Congress, under its power to regulate foreign commerce, to lay down by statute general rules governing the conditions under which cables may be landed.

¹⁰⁸ Hart, *Ordinance Making Powers of the President*, pp. 238-250, especially 242.

¹¹⁰ *Ibid.*

¹¹¹ Cf. Tribolet, *International Aspects of Electrical Communications in the Pacific Area*, p. 20, and *United States v. Western Union Telegraph Company* (272 Federal Reporter 311 and 893; 260 U. S. 764). Cf. *United States v. La Compagnie Francaise des Cables Telegraphiques* (77 Fed. 495).

A still clearer example of an implied presidential power which is conditional is the power, growing out of his control of foreign relations, to determine whether the United States, or another state, has jurisdiction over a given territory. With reference to this question, Mr. Taft has written: "Of course the decision of Congress or the treaty making power upon such an issue would be binding upon the Courts, but *in the absence of the decision of either* the action of the President is conclusive with the Courts."¹¹²

These few examples are sufficient to show that reasonable inferences from related congressional and presidential powers may lead to conclusions inconsistent with the assumption of the Chief Justice that the Constitution enacts an "absolute" separation of three exactly distinguishable categories of power. In particular, the last example shows that a presidential power may be *inferred as conditional*. In that event, *ex hypothesi* Congress is not "interfering" with the said constitutional executive power, as it would be doing in the case of absolute constitutional executive powers, when it legislates in the premises.

Important Presumptions Relative to Express and Implied Presidential Powers. It is important to note at this point a difference between express and implied powers which follows from the original interpretation which we made above of the general

¹¹² *Our Chief Magistrate and His Powers*, p. 118. Italics are present writer's.

relation of Congress and President. Congress, we saw, has plenary power of legislation within the scope of federal powers, provided it does not infringe upon the constitutional powers of the President.¹¹⁸ This includes, within the limits thus fixed, a plenary power of "administrative legislation." On the other hand, the constitutional powers of the President are beyond the control of Congress; for here the President is coordinate.

The presumption is thus that an *express* presidential power is an absolute subtraction from the discretion which the idea of "plenary legislative power" implies. This presumption is not irrebuttable. But it is probably overcome only where the express presidential power involves rule-making. Thus Congress may not issue individual pardons; but has a *concurrent* power to issue amnesties. It is, indeed, a matter of degree as to whether the power of the President to issue amnesties is express or implied.

The same presumption also precludes the interpretation of an express presidential power as *conditional*, except in one sort of situation. For this would conflict with the premise of coordinate powers. The one exception is where an express presidential power which involves rule-making overlaps a

¹¹⁸ This proviso has not in the text been hitherto interpreted. We shall now *give* it an interpretation based upon our original major premise of legislative supremacy, exceptions to which are to be strictly construed. In this we are begging the question, as is always done when a theory is constructed by reading premises for deduction into the verbal symbols of a constitutional text.

related and express power of Congress.¹¹⁴ Here, the legislative will of Congress is supreme in so far as it covers the field.

With *inferred* presidential powers the case is entirely different. Congress has under the necessary and proper clause plenary powers of legislation within the scope of federal authority, provided it does not infringe upon the constitutional powers of the President. A particular power not expressly given the President is not a constitutional presidential power until after it has been inferred to be such. Until then, it is only the express presidential powers upon which Congress may not infringe. The otherwise plenary power of Congress exists to condition the inference, which must be made in the light of all relevant clauses of the Constitution. There is, therefore, no such presumption, on the start, as we found in the case of express presidential powers. The presumption is that Congress has plenary power of "willing," limited only by the reserved powers of the states and the express powers of the President. It is only after this presumption is overcome, and an *absolute* constitutional power of the President *inferred*, that Congress is precluded from legislating on the subject. Unless there are peculiar considerations which overcome this presumption in favor of the power of Congress to legislate, the President's power must be *inferred as conditional*, if it is inferred at all.

¹¹⁴ See note 109 above.

Our interpretation will find no peculiar factors justifying the inference of an absolute power of removal, except in a limited number of cases. In making that interpretation, we shall not claim it to be the only possible one.

The Power of the President Relative to the Tenure of Officers Exercising Statutory Executive Powers Unrelated to His Constitutional Executive Powers. The only relevant presidential powers are the power of appointment¹¹⁵ and the duty to take care that the laws be faithfully executed.¹¹⁶ In so far as Congress vests the power to appoint inferior officers in department heads or the courts, this involves a transfer of the power of administrative supervision to the latter, except in so far as Congress may and does limit the same.¹¹⁷ But we hold that, over all his own appointees who exercise statutory executive duties unrelated to his constitutional executive powers, the President has a constitutional power of removal at pleasure. This he derives from the power of appointment taken together with the faithful execution duty. It is thus a resulting power¹¹⁸ inferred from these two powers read together, not from either singly.

¹¹⁵ Constitution, Article II, sec. 2, par. 2.

¹¹⁶ *Ibid.*, Article II, sec. 2, par. 3. This is on the prior assumption that the opening sentence of Article II is not a grant of a supposed "general executive power."

¹¹⁷ This is admitted by the Chief Justice in the *Myers* opinion. See chap. VI above, section on established principles.

¹¹⁸ For the definition of "resulting powers" see Willoughby on the Constitution, I, 89-90.

However, this constitutional power is inferred as being conditioned by those statutes regulating tenure, and only those, which we shall hold to be reasonably inferrible from the relevant powers of Congress. This being so, a statute of this sort may limit or take away the power; but a statute which limits the power in some unconstitutional way, as by seeking to give the Senate a share in removals, is an "infringement" upon this conditional constitutional executive power of the President, and hence may perhaps be ignored by him.¹¹⁹

The Faithful Execution Duty. Since this duty has been claimed as a basis for an absolute power of removal which Congress may not limit or take away, we may stop to give our interpretation.¹²⁰

We have here a duty which, taken by itself, involves no substantive powers not otherwise possessed. It is, by and of itself,¹²¹ merely a duty to exercise such constitutional and statutory powers as he may otherwise possess to the end that the "laws" be "faithfully" executed. Considered alone, it does not authorize the President to disobey any statutes; for in the light of our original picture of the power of Congress, "laws" here means all

¹¹⁹ This is on the assumption that the only condition under which the President is justified in ignoring a statute is where it infringes upon his constitutional executive powers. Cf. Willoughby on the Constitution, III, 1502-1504.

¹²⁰ See note 26a, above, on state cases and practice.

¹²¹ That is, when *not* taken in connection with the power of appointment.

statutes. If, in the exercise of this duty, the President is justified in disobeying a statute, that is only if and because he is justified in disobeying any statute which unconstitutionally "infringes" upon his constitutional powers which he is exercising in order to carry out the duty. One such constitutional power is the conditional power of removal, which is derived, not from the faithful execution clause alone, but when read together with the power of appointment.

This interpretation does not deprive the duty of meaning. For, in the first place, it imposes an obligation upon the President to perform, or accept responsibility for the performance of, such statutory executive power as Congress may delegate to him.¹²² Thus the statutory executive power to build the Panama Canal carried the duty, when the statute for the government of the Canal Zone expired, to use his powers as Commander-in-Chief to govern the Zone.¹²³ Within continental "United States," to take a single example, this clause makes it the "duty" of the President to "execute" the powers delegated to him under the flexible tariff provisions.¹²⁴

We have said that the term "laws" here means all statutes. But it also includes treaties as the "law" of the land. Hence, this duty obliges the

¹²² For historical examples of such delegations, see Hart, *Ordinance Making Powers of the President*, chap. IV.

¹²³ See Taft, *The Presidency*, pp. 84-85.

¹²⁴ See *Hampton v. United States* (276 U. S. 394) for the validity of this delegation.

President to exercise such powers as he possesses to execute the treaties of the United States. It thus made it his duty to intervene in Cuba in execution of the "Platt amendment."¹²⁵ It gave him no additional powers in this connection, but obligated him to use his naval and military powers to restore order.

The term "laws" as here used also means obligations of the federal government which may, for this purpose, be classed as "law." Under the reasoning of the *Neagle* case,¹²⁶ this duty gave the President no substantive power, but merely obligated him to exercise the control which he already possessed over the Department of Justice so as to "take care" that the obligation of the federal government, considered as a "law," be "faithfully" executed.¹²⁷

This duty thus furnishes a "peg" upon which to hang the justification of the exercise of presidential

¹²⁵ See Taft, *The Presidency*, pp. 70-76.

¹²⁶ *In re Neagle* (135 U. S. 1). In short, the order to the deputy marshal was a result of the power of administrative supervision. It had legal standing, in connection with the removal of the case to the federal courts, because it was issued in execution of the President's duty to exert *all power at his disposal* (in this case his power as administrative superior, the correlative of his power of removal) to the end that the federal obligation be carried out. Note that the order gave no power over private persons not possessed by all citizens. The rest was a matter of interpretation of the intent of Congress relative to the removal of cases to federal courts.

¹²⁷ Cf. Taft, *The Presidency*, pp. 76-80, and Hart, *Ordinance Making Powers of the President*, pp. 229-235. At p. 129 Taft holds statutory authority is not needed to enable the President to use force to preserve the "peace" of the United States.

powers in particular ways. As such, it is given meaning, and indirectly involves the exercise of important powers it might be difficult otherwise to justify. But it gives power only when combined with some constitutional or statutory power which the President otherwise possesses.

This clause also imposes upon the President the duty to "take care" that the other executive officers to whom Congress delegates statutory executive powers shall "faithfully" execute the same. What meaning shall we assign to this phase of his duty?

It cannot mean that the President is by this duty alone authorized to supervise and remove all such officers. For it has already been held that over those inferior officers whose appointment Congress has taken from the President he has no control, except indirectly in cases where he has control over the appointing officer.¹²⁸ This control he does not have over the courts of law, in which such appointments may by Congress be vested.

This duty thus authorizes the President to remove only those of such officers whom he appoints. This means that this phase of the removal power is derived from these two clauses together, as we have said above. And it will be remembered that it is derived as conditional upon the enactment of otherwise valid statutes governing tenure.

¹²⁸ See *United States v. Perkins* (116 U. S. 143), as interpreted in *Myers v. United States* (272 U. S. 52).

But if this clause alone gives no power of supervision, and authorizes the President to violate no statute, not even an invalid statute regulating tenure, what does it mean in relation to these other officers?

It seems quite reasonable to hold that this clause gives the President no power to disobey any statute governing tenure in order to take care that others obey another statute. For except in so far as he is given by the Constitution independent powers, the duty of the Executive is always to obey the "laws" and never to question the validity, as "laws," of the statutes.¹²⁹ With the exception noted, the Executive is the mere agent of the legislature, by the very nature of the case.

It is our interpretation that this subordination is precisely what this duty in positive terms prescribes. It obliges him to carry out the statutory executive powers delegated to him by statute, and to "take care"—but always within the limits prescribed by statute—that the other executive officers do likewise. It implies precisely that he exercise his constitutional and statutory powers to the end that they do so. If Congress grants them independence of tenure, Congress is not infringing upon any presidential power, but merely narrowing the scope of his obligation.

The Powers of Congress Relative to the Tenure of Officers Exercising Statutory Executive Powers Unrelated to the Constitutional Executive Powers

¹²⁹ See note 119 above.

of the President. The President's power of removal of such of these officers as he appoints is by inference conditioned by the provisions of such regulations respecting their tenure as Congress may be inferred to have. Let us see what these latter inferences are. Congress is authorized to create offices, and it is here creating them as "necessary and proper" means "for carrying into execution" its own enumerated powers which do not bear directly upon the constitutional powers of the President. The powers of such officers are entirely statutory executive powers, vested in them by statute, and not directly connected with any constitutional executive powers vested by the Constitution directly in the President for his own independent exercise. It is an eminently reasonable conclusion from these facts that Congress has authority to fix their tenure, either by granting tenure during good behavior, or tenure for a term of years, subject only to impeachment, or by "delegating" to the President the statutory executive power to remove them for cause only, and only after a hearing. This being granted, it follows that such enactments in no way "infringe" upon the constitutional power of the President, which by inference is only the power to remove, at pleasure, in the absence of such legislation as is reasonably deducible from the foregoing powers of Congress. This is the only interpretation which gives due weight to all the factors that must enter into our constitutional inferences.

An Illustration. These conclusions apply to those executive officers who are set up as necessary and proper means for carrying into execution the financial, commercial, spending,¹³⁰ postal, and any other powers of Congress not directly related to the independent powers of the President. A single illustration will make the reasonableness of our inferences clearer.

Congress is authorized to "regulate" interstate commerce.¹³¹ This involves laying down rules governing the subject. It does not involve direct supervision by Congress over the railroads to apply and enforce these rules. That is forbidden by the separation of powers. But this does not mean that Congress has nothing to do with the enforcement of its legislative policies. It cannot itself "execute" these rules; but, as we have seen, it is authorized to enact all laws "necessary and proper" for carrying them into execution. It may determine the "executive" organization necessary for this purpose, and define the powers which this organization is to exercise.

Now, then, if the policy of Congress is to lay down a general formula as to rates in interstate railroad traffic, and to leave it to a commission to exercise the quasi-legislative function of concretizing this abstract formula through the employment of a quasi-judicial procedure, the guarantee of indepen-

¹³⁰ Corwin, "The Spending Power of Congress," in *Harvard Law Review*, XXXVI, 548.

¹³¹ Constitution, Article I, sec. 8, cl. 3.

dence of tenure to the members of the commission becomes a vital part of its "legislative" policy, a "necessary and proper" provision for the effectual exercise of its power to regulate interstate commerce.

In view of this fact, it seems reasonable to infer only a conditional power of removal as granted by the Constitution over interstate commerce commissioners. The powers they exercise are outside the range of the powers vested in the President by the Constitution. The power to remove them does not follow from his power to appoint them, since the faithful execution clause is relevant evidence on the question of administrative supervision. That clause, by itself, only imposes an obligation to exercise his powers otherwise possessed to the end that such commissioners faithfully execute the statutes which fix their powers. By itself, it grants him no additional powers, certainly no powers as against statutes which express a reasonable legislative policy (such as independence of tenure) relative to the faithful execution of the substantive rules governing railroad transportation. The opening sentence of Article II vests in the President, besides the express powers that follow, only those which may reasonably be inferred from them in the light of the relevant powers of Congress. In that light, only a conditional power of removal may be inferred as a resultant not of any one power, but from the power of appointment taken together with the duty to see

to the faithful execution of the statutes. The fact that the power of removal is "executive" does not place it among the executive powers vested by the Article II in the President alone. For that is not the sole source of executive powers. Some of them are created and defined and vested by Congress, if and when it sees fit. Congress may, *ex hypothesi*, limit or forbid the conditional constitutional power of removal, though not by vesting the "executive" power of removal in legislative organs.

Tenure During Good Behavior for Such Offices. This would of course do away with the conditional power of removal, but it is reasonable to infer that it is conditioned upon just this sort of statute. Nor does the fact that judges are guaranteed tenure during good behavior by the Constitution prevent Congress from guaranteeing it to others. The maxim of construction *expressio unius est exclusio alterius* does not here apply.¹³² For that maxim leads merely to the conclusion that the Constitution does not guarantee such tenure to others than judges. The fact that the Constitution gives this guarantee to protect judges from control by the political departments cannot be twisted into a prohibition upon Congress, preventing its voluntarily giving this same status to other officers. The constitutional guarantee applies only to judges. But in protecting them

¹³² See the refusal of the Court to apply this maxim, on the ground that it is inapplicable, in another sort of situation: *Springer et al. v. Philippine Islands* (277 U. S. 189).

against Congress and President, it does not imply that Congress may not give to other officers a like protection against the President.

Independence of Tenure of Cabinet Officers. Professor Corwin, while advocating a conditional power of removal,¹³³ stops short of applying it to "cabinet" officers. He writes: "Heads of departments composing the president's cabinet, regardless of their statutory duties, today occupy an advisory capacity in relation to the president which is political in nature and which renders these officers inherently subject to an unqualified power of removal in the President."¹³⁴ While he holds that "both the power of appointment and the power of removal are conditioned by what Congress may constitutionally do, under the 'necessary and proper' clause, in the way of imposing qualifications for the officer and defining the tenure of office,"¹³⁵ and while he distinguishes an absolute from a conditional power of removal on the basis of "the essential character of the office,"¹³⁶ he stops short of our application of these principles.

Now the facts of the two situations may require Congress to delegate broader discretion to the Shipping Board than to the Postmaster General. But both are business-operation agencies set up by Congress to exercise such discretion as it may delegate

¹³³ *The President's Removal Power*, p. 66.

¹³⁴ *Ibid.*, p. 58.

¹³⁵ *Ibid.*, pp. 56-57.

¹³⁶ *Ibid.*, p. 61.

under its legislative powers. There is no legal basis for distinguishing them under the principles which we have "found" in the Constitution, unless it be that since 1829 the Postmaster General has sat in the President's cabinet.

The cabinet as such, however, is an extra-legal "constitutional" ¹³⁷ development. Its operation belongs to the "conventions," ¹³⁸ not the "law" of the constitution. It is a matter of history, not of constitutional necessity, that the Postmaster General is a "department head" and a "cabinet officer," ¹³⁹ whereas the Shipping Board is a "separate" and "plural" executive agency. If the Postmaster General were given independence of tenure, the President might still invite him into his "cabinet" for consultation, and could still require of him his "opinion in writing" ¹⁴⁰ upon any subject in his department. For this purpose—which we assume to be in order to get data for reporting to Congress on the state of the Union and recommending to it measures—the chairman of the Interstate Commerce Commission, or the members collectively, whether or not independent in tenure, might be regarded as the "principal officer" in that "department." For the difference between "departments" and "com-

¹³⁷ That is, it is part of the constitution only in the broader of the two senses in which that term is commonly used.

¹³⁸ Cf. Dicey, *Law of the Constitution*, *passim*.

¹³⁹ Thus the Attorney General has been a cabinet officer from the beginning, but was not made a "department" head until 1870.

¹⁴⁰ Constitution, Article II, sec. 2, cl. 1.

missions " is of no particular constitutional significance. It is a matter of expediency in organization. The composition of the cabinet is a matter of history and presidential choice. Originally, it included all principal officers, although one of them—the Attorney General—was for a long time not a " department head."¹⁴¹ The cabinet does not include some important officers who are subject to the President's administrative supervision,¹⁴² and might include some who are not.¹⁴³ For the present relation between the President and " cabinet " officers does not depend upon their being cabinet officers, but upon the relation which he bears to them as individual officers. Since the ten department heads have thus far been his subordinates, he consults them as a group. But this has no connection with the question whether Congress may make them independent. This would indirectly alter the relation of the President to the cabinet as at present constituted; but provided the legislature is inferred to have a given power from the Constitution, it is not prevented from overriding, by an exercise of its legal powers, certain features of a " constitutional convention." The latter may be nullified by an act of a governmental organ acting within the scope of its delegated legal powers.

¹⁴¹ See note 139.

¹⁴² For example, the Director of the Budget is not a member of the cabinet.

¹⁴³ As happened when Vice-President Coolidge sat in the cabinet meetings of President Harding by invitation of the latter.

The President Must Personally Exercise Some of His Powers, But May Devolve Others Upon Appropriate Subordinates Who Are Removable by Him at Pleasure. Most of the constitutional executive powers of the President must be exercised by the President personally. Thus he could not delegate to a subordinate the power to veto a bill, or to issue a pardon, or to convene Congress in extraordinary session, or to nominate or commission officers, or to fill vacancies. There are also certain statutory powers which the President must exercise by personal acts, such as perhaps suspension of the writ of habeas corpus,¹⁴⁴ or the decision of an appeal from conviction by a court martial.¹⁴⁵

In other cases, however, the President may devolve upon appropriate subordinates whom he may remove at pleasure the decision, in his name, of discretionary powers vested in him by the Constitution or by statutes.¹⁴⁶ In such cases the President may

¹⁴⁴ See *Ex parte Field* (5 Blutchford 63), and Hart, op. cit., p. 188. The Field case deals with an order of the Secretary of War purporting to suspend the writ with reference to citizens arrested for attempting to escape the draft by leaving the country. The order purported to have been issued by order of the President, but the court refused to accept it as such. This case dealt with the situation that existed before Congress authorized suspension of the privilege of the writ. It is thus not strictly in point as to the power as a statutory executive power, but it suggests the possibility that a personal act might be required even there.

¹⁴⁵ Cf. *Runkle v. United States* (122 U. S. 543). This was because the power is "judicial."

¹⁴⁶ Cf. Fairlie, "Administrative Legislation," in *Michigan Law Review*, XVIII, 181. Professor Fairlie refers to re-delegation of executive power, and raises the question how far it may go.

act personally, or may explicitly authorize such subordinates to act in his name. But from the fact that they stand to him in the relation of administrative inferior and superior, or from the fact that he may remove them at pleasure (from either of which the other is implied), the courts will presume that acts performed by them in the exercise of his discretion are, unless he must act personally, in conformity with his wishes. In contemplation of law, they are his acts.¹⁴⁷

The courts have never clearly defined the distinction between acts which must at least receive his personal attention, and acts which, when done by the appropriate subordinate, are taken as his acts. Actually, however, most acts in exercise of his constitutional discretion relative to foreign, military and naval affairs may be performed by subordinates, but not all; ¹⁴⁸ while all his other constitutional executive powers must probably be exercised by him personally. But what evidence a court will require of "personal decision," and whether the same evidence will suffice in all cases, are themselves somewhat doubtful questions.¹⁴⁹

Acts of Other Officers Are, in Contemplation of Law, the President's Acts Only Where He May Re-

¹⁴⁷ Cf. Hart, op. cit., pp. 186 ff.

¹⁴⁸ Cf. note 145 above.

¹⁴⁹ In the Runkle case, the Court said it would not assert the order there in question need be signed by the President, but declared the order must at least be "authenticated in a way to show otherwise than argumentatively that it is the result of the judgment of the President himself." See Hart, op. cit., p. 188.

move Such Officers at Pleasure. This legal presumption cannot be accepted by the courts where the officer is not fully subject to the President's administrative supervision; and this is the case only where the officer is removable at pleasure. In no other cases can it be presumed that the officer was acting in the name of the President and in accordance with his wishes. Hence, his act could in no other cases have any binding effect.

In fact, the President could not authorize an independent officer to act in his name by formal Executive Order. For this would be to "abdicate" his powers instead of merely "delegating" them to his administrative inferiors. This is so, at any rate, with reference to the President's discretionary powers.

The Result Where Congress Sets Up Independent Officers to Exercise Statutory Executive Powers Unrelated to the President's Constitutional Executive Powers. We have seen that Congress may set up such officers, and they do not necessarily have any connection whatsoever with the President. Congress may make them unremovable by the President, or removable for cause only; or it may leave them (or explicitly "make" them) removable at pleasure.

But Congress may also delegate such statutory executive powers to the President. In that event, if it sets up executive officers connected therewith, it will naturally make them administrative inferiors of the President. It will also naturally leave them subject

to his removal at pleasure. But if it made them independent, then the President's administrative control would be meaningless.¹⁵⁰ Their acts would not be in contemplation of law his acts, but the courts would have to interpret the statutes in order to read out of their self-contradiction whether these officers were given concurrent power with the President or no power at all. There would, however, be nothing unconstitutional about the provision for independence of tenure.

The Result Where Congress Sets Up Officers to Exercise Such Constitutional Discretion of the President as He May Devolve Upon Them: Any Limitations Upon the President's Power of Removal at Pleasure Are Unconstitutional. Congress may not "authorize" any officer to act in the name of the President in the exercise of powers exercisable only by personal decision of the President under the Constitution. It may, however, "authorize" officers to act in his name in connection with powers which he may devolve upon others. This does not mean that Congress may "vest" in them the power to perform powers "vested" in the President by the Constitution. It merely means that it may set up offices as fully subject to the President's administrative control in connection with his constitutional executive powers. As such, they are officers upon whom he may devolve the constitutionally

¹⁵⁰ Since administrative control is the correlative of the power of removal at pleasure.

vested discretion which, at pleasure, he may exercise himself. As such, also, they are officers whose acts, in exercise of the President's constitutional discretion which need not be personally exercised by him, are, in contemplation of law, his acts.

It follows that Congress may not give such officers any degree of independence of tenure. It must leave them subject to his power of removal at pleasure. For Congress in such a situation to regulate tenure in any way that limits the President's power to remove at pleasure is for it to interfere with his constitutional executive powers by seeking to devolve them upon others.

A statute which set up officers to carry out the President's orders relative to his constitutional discretion, and yet made them, say, removable for cause only, would be unconstitutional in its provision as to tenure. The rest of the statute would stand.

This result is different from that of the last section. There we faced a situation where, in creating statutory executive duties, Congress may both regulate tenure and "vest" the statutory powers either in the President or in other officers—all at its discretion. Hence, it seemed reasonable there to let an explicit provision on tenure stand, and then seek a sensible "meaning" for the statutory provisions as to powers.

But in the situation involved in this section, the powers concerned are directly vested by the Constitution in the President. Congress has more or

less of a moral obligation to set up officers upon whom the President may devolve his powers—an obligation that in some cases,¹⁶¹ where his powers are vast, is an imperatively “necessary,” as well as a “proper” means “for carrying into execution” the President’s powers. Let us suppose Congress has provided this means, but has also provided independence of tenure. If the latter provision were upheld, these officers could never be presumed to have acted in accordance with the President’s wishes. Their acts could not be taken as his. They could exercise no constitutional discretion in his name—no discretion at all, unless they happened to be given additional statutory powers unconnected with his constitutional powers. They would at any rate be useless as his agents. But if the provision as to tenure were held invalid, and the rest of the statute allowed to stand, the statute would be useful as well as constitutional. The reasonable conclusion is to consider the provisions separable, and hold the provision as to independence of tenure invalid.

Illustrations. Rev. Stat. 202 reads:

The Secretary of State shall perform such duties as shall from time to time be enjoined on or entrusted to him by the President relative to correspondences, commissions, or instructions to or with public ministers or consuls from the United States, or to negotiations with public ministers from foreign states or princes, or to memorials or other applications from foreign public ministers or other foreigners, or to such other matters respecting foreign affairs as the President of the

¹⁶¹ In the cases, namely, of foreign, military and naval affairs.

United States shall assign to the Department, and he shall conduct the business of the Department in such manner as the President shall direct.

Rev. Stat. 216 reads:

The Secretary of War shall perform such duties as shall from time to time be enjoined on or intrusted to him by the President relative to military commissions, the military forces, the warlike stores of the United States or to other matters respecting military affairs; and he shall conduct the business of the Department in such manner as the President shall direct.

Rev. Stat. 417 reads:

The Secretary of the Navy shall execute such orders as he shall receive from the President relative to the procurement of naval stores and materials, and the construction, armament, equipment and employment of vessels of war, as well as all other matters connected with the naval establishment.

The "orders" and "duties" which the President may "enjoin" upon these three officers in respect of his illimitable powers connected with foreign, military and naval affairs, are presumed to have been given from the very fact that they act in his name. Their acts are, in contemplation of law, his acts. This is necessary where one man has the vast powers here involved. But since this interpretation of the statutes makes these three officers ones upon whom the President may devolve his constitutional discretion, Congress cannot regulate their tenure. For he must be allowed a power of removal at pleasure as the correlative of the absolute super-

vision which he must have over officers that act in his name in connection with such powers.

The President Has Absolute (Illimitable) Power to Remove at Pleasure All Officers Set Up by Congress as Officers Upon Whom He May Devolve His Constitutional Executive Powers. This power the President derives from the power of appointment taken together with these constitutional powers themselves.¹⁵² They may reasonably be held to involve the power to remove all officers who stand to him, in connection with these powers, in the relation of administrative inferior and superior.

If the Senate is associated with treaties, it is not associated with the other powers connected with foreign affairs.¹⁵³ Indeed, the better view is that the Senate is not associated with the negotiation of treaties,¹⁵⁴ although individual senators may be made presidential agents in such negotiations.¹⁵⁵ Hence, the Senate does not share in the discretion, or most of it, which may be devolved upon the Secretary of State, and certainly does not share in the discretion which may be devolved upon the Secretaries of War and of the Navy. It shares with the President the power of appointing these officers, but not all the powers from which the President's power to remove

¹⁵² As listed, or implied as absolute powers.

¹⁵³ The powers, for example, of recognition, of receiving ambassadors, of making certain executive agreements, etc.

¹⁵⁴ See Willoughby on the Constitution, I, § 284.

¹⁵⁵ As was done by Presidents McKinley, Harding, and Hoover.

them is derived. It has, therefore, no valid constitutional claim for participation in their removal.

This sole power of the President to remove at pleasure all officers set up by Congress as officers upon whom he may devolve his constitutional discretion, being a constitutional power resulting from and involved in his specific constitutional powers, may not be limited by Congress. It is absolute, since for Congress to limit it would be for it to "devolve" his constitutional discretion upon other officers. That would clearly be "infringement" upon his independent constitutional powers, with reference to which he is coordinate with Congress. By making a particular officer the administrative inferior of the President in the execution of his constitutional powers, Congress automatically precludes any power it might otherwise have of regulating the tenure of such officer in any way that will limit the President's power to remove him at pleasure. Thereupon, any limitation of the President's removal power is void.

Now the President's constitutional powers, devolved upon officers removable by him, may in turn be devolved upon the assistants to the latter.¹⁵⁰ Congress may vest the appointment of such assistants, as "inferior" officers, in the "principal" officer directly under the President. In such event, our conclusion must be either (1) that the President's removal power is not here confined to his appointees,

¹⁵⁰ See note 146 above.

or, if it is, (2) that Congress cannot regulate the tenure of such "inferior" officers by forbidding or limiting the power of the department heads to remove them at pleasure.

If we accept (1), we imply that here the coordinate position of the President, relative to his particular constitutional powers, outweighs the location of the power of appointment as evidence of the location of the power of supervision, and hence of the correlative power of removal. Whether the appointing officer has, in view of his position as *alter ego* of the President in such supervision, also a power of removal, and whether Congress would be "infringing" upon presidential discretion if it attempted to enact statutes relative to removals by the department heads, would be minor matters. The President, at all events, is protected if Congress may not regulate his absolute power to remove at pleasure all who exercise his constitutional powers in his name.

If we accept (2), we imply that the President's power of supervision comes from his power of appointment taken together with his special constitutional powers. But Congress would be "devolving" presidential powers upon others if it here restricted the power of the department head to remove at pleasure such of his appointees as might exercise such presidential discretion. This absolute power of the department head would result from the power of appointment taken together with his position as *alter*

ego of the President in the exercise of constitutional executive powers of the latter.

The "delegation" by the President of his constitutional executive powers to other executive officers may proceed for several stages, perhaps to any degree, down the hierarchy,¹⁵⁷ provided each officer is by statute given authority to act as a "delegate." But where he is, Congress may not give him any degree of independence of tenure. Constitutional executive powers are not "devolved" upon other officers by Congress, or "abdicated" by the President, provided (1) the President can remove at pleasure all officers who exercise such powers in his name, or else (2) each such officer is removable at pleasure by a superior, until we get to the President. The choice between these alternatives is immaterial to our purpose.

There Are Some Officers Who, If Set Up at All, Must Be Left Subject to the President's Power of Removal at Pleasure. An ambassador or other foreign minister holds a position which, by definition, involves devolvement of the negotiating power of the President upon the holder of such office. Hence, if Congress creates such officers at all, it cannot regulate their tenure. Possibly a consular position carries, by definition, enough of the character of representative of the President to be placed in the same category.¹⁵⁸ Certainly this is true of an assis-

¹⁵⁷ See note 146 above.

¹⁵⁸ This would be a problem where the courts would have to apply our general distinction to a borderline case.

tant secretary, whatever his powers as such, if and when he acts, by statutory authority, for his superior officer upon whom the President may devolve his constitutional executive powers, whether the latter officer be absent, or his office be vacant.

We shall not consider in detail the power of removal as related to the military and naval personnels themselves. The powers of Congress to "raise and support" armies, "provide and maintain" a navy, and "make rules for the government and regulation" thereof, are confronted by the power of the Commander-in-Chief. Only members of the military and naval personnel who are appointed by the President raise a problem.¹⁵⁹ These can undoubtedly be removed by him under his conditional power of removal. He must also have the power to decide what officers shall have the decision, in his name, of matters of strategy.^{159a} But this does not involve removal from the office, say, of brigadier-general. The issue is properly whether he should be assigned, as Commander-in-Chief, the power to remove at pleasure—dismiss from the service—officers appointed by him, even where Congress may try to prohibit or regulate this power. We do not think this neces-

¹⁵⁹ See *United States v. Perkins* (116 U. S. 483).

^{159a} Thus the General Staff Corps of the Army consists of officers selected by the President from the existing officers. *United States Code, Annotated*, Title 10, p. 12. The President must be able to place officers on this Corps, and relieve them of such duties as well. Whether it is necessary that he "remove" them as officers is another question.

Cf. also Title 34, pp. 36-37, relative to the Navy.

sary.^{158b} Provided only the President have power to control strategy by designating which officers shall decide such matters in his name, it would seem that the same principles apply here as we shall apply to civil officers set up as "aids" to the President

^{158b} In *Wallace v. United States* (257 U. S. 541), decided in 1922, a lieutenant colonel had been dismissed during the war by the President. Rev. Stat. § 1230 provided that, when an officer so dismissed applied for a trial, and a court-martial were not convened in six months, the order of dismissal should be void. The Court held that the appointment of another lieutenant colonel, two weeks after the dismissal, was to be construed as the appointment of his successor by and with the advice and consent of the Senate; and that § 1230 referred to dismissal by the President alone. Hence, the officer had been dismissed by the appointment of a successor and not contrary to § 1230. Several prior cases were cited to show that such statutory limitations did not prevent removal by appointment of a successor.

Four years after the *Wallace* case came the *Myers* case, which in effect held that there is no such thing, either under the Constitution or valid statutes, as removal by the consent of the Senate. Such consent adds nothing to the sole power of the President. This being so, how could a successor be appointed until a valid removal had been made by the President alone? And why, then, was not the removal in the *Wallace* case made void by the refusal to convene a court-martial, *unless the statute in question was itself invalid*?

Must this last interpretation be placed upon the *Wallace* case? If Congress cannot regulate the President's sole power of removal at all, the *Wallace decision* is not by the *Myers* decision rendered unsound, we must admit. Only it would seem to rest upon the premises of the Chief Justice in the *Myers* opinion, not upon the premises of the Chief Justice in the *Wallace* case itself! For we do not think that, since the *Myers* decision, it is good law to hold that Rev. Stat. § 1230 does not apply to officers removed by appointment of a successor. This line of cases was apparently decided under the influence of the idea that perhaps removal was properly with the Senate's consent, and hence such consent, if given the appointment of a successor, operated to make a clearly valid removal, even if removal by the President alone in such cases would possibly not be valid. Just how this was consistent with the assumption in Rev. Stat. § 1230 of a *presidential* power of removal *that was thereby*

in the three "presidential departments." This is so, at least, provided Congress provides adequate means for discipline and the guarantee of obedience to orders by the officers of lower grade and by the enlisted men. This can be done by providing imme-

to be limited is not clear. But certainly this dual idea of a removal by the President and a removal by the President and Senate is no longer tenable. Hence, the latter being non-existent, the issue relates only to the former, and *a successor can be appointed only after a valid removal by the President alone (or other cause of vacancy)*. An appointment can only be made to an office that is vacant. Of course, the case is complicated by the fact that there was a "vacancy" created by the dismissal; but this vacancy was merely temporary, and under the statute the dismissal became void. Appointment could not reasonably take place meantime.

It thus becomes clear that *in the light of the later Myers case*, the *decision* of the Wallace case appears *unsound*, unless the admission is made that Congress cannot regulate tenure. The *decision* is, on that admission, *sound*. Does this force us to conclude that the Wallace case be taken as holding Rev. Stat. § 1230 invalid?

The answer is no. For even on that admission, as we have seen, the *grounds given* for the decision are *unsound in the light of the Myers decision*. This indicates the unwisdom of reading cases backwards. We are not bound to read back into such a case deductions drawn from a later case, and thereby make the earlier case hold something the opinion does not even purport to pass upon. Nor is this inconsistent with our insistence that a case does not necessarily hold *all* its opinion purports to hold. So important a question can never finally be settled in that way—can only be settled by a Court passing *directly* upon the issue *with the Myers case in mind*. We need only consider the Wallace case as now rendered anomalous. Its *premises* are now "overruled" by the Myers decision, and hence it is irrelevant to a discussion of present law. At any rate, it can be limited to army and naval officers, or at least to officers of the three presidential departments, who are appointed by the President.

The Court *might* still hold that the Wallace case and its predecessors show that Rev. Stat. § 1230 does not apply to officers removed by appointment of a successor. But we do not think this would now be good law for reasons already pointed out. At the very least, we hold that Congress, if it can regulate the removal by the

diate punishment, and even dismissal after a court-martial trial, for any insubordination, disobedience to orders, misconduct, and the like. It *might*, however, reasonably be held that the President has illimitable power to remove at pleasure all officers whom he himself appoints in these two services.

The Absolute Power of Removal at Pleasure Does Not Apply to Such Officers as Congress May Set Up to Aid the President in the Exercise of His Constitutional Executive Powers, But Who Are Not Authorized by Statute to Exercise In His Name the Discretion Involved in These Powers. Congress may set up officers to make technical studies, give expert advice, furnish experienced counsel, perform routine and clerical functions in aid of presidential constitutional powers. It creates such officers under its power to "establish" officers necessary and proper for carrying into execution the powers vested in the President by the Constitution.

Since it has power to enact all laws necessary and proper for this end, it may define the powers of these officers in detailed terms, or vest in them the power to obey instructions as to their routine functions.

President of his appointees, can, by using plainer language, thereby prevent the appointment of a successor as a means of removal. For an appointment cannot be made to an office that is not vacant.

For statutory provisions relating to "dismissal" from the service, and "retirement" and "discharge," see *United States Code, Annotated*, Title 10 (Army), and Title 34 (Navy).

Does Congress have any greater power to regulate dismissal in time of peace than in time of war? Congress has made such a distinction in Rev. Stat. § 1229; and conceivably its *competence* might be held to be different in peace and in war.

In either case, their powers are statutory executive powers, created, defined, and "vested" in them by statute. They involve no authorization to exercise the constitutional discretion of the President on his behalf. Hence, the President derives at least a conditional power to remove at pleasure such of them as he appoints, and only these, from his power of appointment read together with his faithful execution duty, as in the case of other statutory executive powers.

As in the case of other statutory executive powers, Congress may regulate their tenure, provided it does not infringe upon the constitutional executive powers of the President.

But these statutory executive powers are not unrelated to his constitutional executive powers. In making such officers independent, Congress is not devolving the constitutional discretion of the President upon others or narrowing its scope. We have said in an earlier section that, provided it does neither of these things, Congress has plenary power of administrative legislation within the whole range of federal power. Hence, we have said it could give them detailed powers as well as the duty to obey instructions. Hence, also, we conclude that it has the same power to regulate their tenure as it has over executive officers created to exercise statutory executive duties unrelated to the President's constitutional powers.

We readily admit, however, that their relationship to such powers might be taken to exclude Congress from prohibiting their removal altogether, and would enable it to go no further than to prescribe removal by the appointing authority for cause only and only after a hearing.¹⁶⁰ In that event, the President or his *alter ego*, the department head, would have an absolute power to remove for disciplinary purposes, but only in accordance with a reasonable statute providing for removal for cause. This power would be a resultant of the power of appointment read together with the special constitutional powers of the President concerned. The inference would be that the latter powers "involved," for the appointer, whether President or *alter ego*, an *illimitable* power of removal *to the extent above defined*, such extent, and such extent only, being reasonably necessary to the exercise of the President's constitutional powers in the most effective manner. Congress would not be infringing upon the power thus defined by enacting a reasonable law for removal for cause only, but would infringe upon such an illimitable power by prohibiting removal altogether. This would constitute a special exception to our earlier rule, but it is not an unreasonable extension of our definition of what ordinarily constitutes "interference" by Congress. Especially is this true in view

¹⁶⁰ This is another problem which would depend for its solution upon a *choice*—in the application of our principles—which the courts would have to make.

of the fact that, in practice, the " permanent staff " of a department actually influences policy in subtle and important ways.¹⁶¹

Some Practical Considerations. Aside from the constitutional questions, there are certain important practical considerations to be considered at this point. These center around the fact that the President's constitutional powers relating to foreign, military and naval affairs are in sharp contrast to his other constitutional executive powers.

Those of his constitutional powers which center in the three named departments require the continuous control of elaborate administrative machinery. Discretionary action must be taken at every step. This requires in practice a subordinate upon whom the President can, in each department, devolve his power, save in instances which require his personal decision or instances where the importance of the decision makes his personal decision expedient. In fact, it is practically necessary to have several assistant secretaries, as well as a principal officer, who are removable at pleasure.

Not so with the other constitutional executive powers of the President. All the rest are powers to make special and specific types of decisions. There is not involved a continuous function, but a series of intermittent and isolated decisions, each to be decided on its own merits under the particular circumstances. Each decision is individual, dealing

¹⁶¹ Cf. Lowell, *Government of England*, I, chap. VIII.

with a particular problem, and probably must be performed by a personal decision of the President. It is completed by the issuance of a specific order, whether Proclamation or Executive Order.¹⁶² There is then nothing further to be done in connection with the power until another and separate and specific decision is to be made. This likewise will arise as an individual problem, and be decided by a single, specific act.

The practical consequences of this sharp contrast are obvious. There must be highly organized Departments of State, of War, and of the Navy. In each there are needed also a principal officer and several assistants upon whom the President may devolve his constitutional discretion, and who must therefore be removable at pleasure by the President. Woodrow Wilson was correct when he implied that otherwise we should have to elect athletes to the Presidency.¹⁶³ Even an athlete could not have the time to attend to everything personally, even in a formal and perfunctory manner.

With reference to the other constitutional powers of the President, this is not the case. They must be exercised personally, and come as individual problems. Hence, the President needs only clerical aid, technical advice, and political counsel. His clerical aid comes through a personal staff, which is

¹⁶² For these, as forms of presidential action, see Hart, *op. cit.*, Appendix.

¹⁶³ *Constitutional Government in the United States*, pp. 79-80; see also pp. 76-77, 79-81.

naturally removable. His political advice could be secured from unofficial personal or party advisers. Only in certain matters is technical advice needed which could not be obtained in unofficial ways or by requiring of any department head his opinion in writing.¹⁶⁴ In the case of pardons, he might need special assistance in the form of politico-legal advice and investigation of cases. This implies an officer who would be removable, but who need not be the Attorney General. His general legal advice could probably be satisfactorily secured from a permanent Attorney General.

Congress May Place Upon Officers, Set Up as Presidential Agents Upon Whom He May Devolve His Constitutional Executive Powers, Statutory Executive Powers Unrelated to the Former; But It Does Not Thereby Acquire Power to Regulate Their Tenure. In practice, Congress often places such unrelated powers upon such presidential agents. An example is the "home functions" under the Secretary of State. But if Congress could thereby acquire power to regulate their tenure, it could in every case evade the basic principle that it cannot limit the President's supervision of officers upon whom he may devolve his constitutional executive powers. If Congress desires to place the above-mentioned "home functions" in the hands of an independent officer, it must give them to an officer upon whom the President may not devolve his constitutional executive

¹⁶⁴ As per the Constitution, Article II, sec. 2, par. 1.

powers. It must, in short, either set up an officer for this sole purpose, or give these powers to an officer to whom are delegated only statutory executive powers which are unrelated to the presidential constitutional executive powers, or related only to the routine powers connected therewith. Congress will have to take this into consideration in connection with its allocation of powers. Of course, if the Secretary of State is given ministerial duties unrelated to the constitutional discretion of the President, he is bound by the statute, and may be subject to the writ of mandamus, in a proper case, to compel him to perform this duty.¹⁶⁵ But this does not "interfere" with the President's constitutional discretion. The point is that officers upon whom he may devolve such discretion must be removable by him at pleasure and hence he incidentally acquires supervision over such other powers of a *discretionary* nature as Congress may grant them. Judicial review ordinarily comes into play only after the discretion has been exercised,¹⁶⁶ and is primarily concerned with "jurisdiction," at least in connection with constitutional executive powers.¹⁶⁷

It might, to be sure, be held that in such cases Congress could, without thereby "interfering" with the President's constitutional discretion, require the Executive, in removing such an officer, to

¹⁶⁵ Cf. *Kendall v. United States* (12 Pet. 524).

¹⁶⁶ Cf. *Mississippi v. Johnson* (4 Wall. 475), and Hart, *op. cit.*, pp. 306 ff.

¹⁶⁷ Cf. Hart, *op. cit.*, pp. 31-32.

state in a public document that the removal resulted from dissatisfaction with the officer *in re* constitutional executive powers, or else he could remove for cause only or not at all. But this possible limitation is so easily evaded as to be negligible.

Where the Constitutional Powers of Congress and President Overlap: Military and Naval Powers. If we turn to military and naval matters, we find that Congress and the President both have powers. But while the boundary line between the two cannot be drawn with perfect precision, the case gives us no real difficulty. The present writer has elsewhere shown, after detailed examination of the relevant clauses, that:

1. Congress has the *exclusive* power to raise armies and establish navies, and also the power to regulate their general administration in as much detail as it sees fit.

2. The President as commander-in-chief has the *exclusive* power to command the army and the navy in the *military* sense, which includes: (a) ordering them to any part of the world in peace as well as war, (b) directing their operations in time of hostility, and (c) through them governing enemy territory conquered in time of war. He also has a *concurrent* power as commander-in-chief to issue at least minor administrative regulations with or without delegations from Congress, and though such regulations may not be in conflict with provisions of law, they may deal with phases of the same subjects not covered by the law.¹⁶⁸

To set up one principal officer to carry into execution the rules issued under the exclusive powers of Congress, and another to aid the President in his

¹⁶⁸ Hart, *op. cit.*, pp. 241-242.

exclusive powers of command, would be unworkable. Common sense dictates the conclusion that both sets of "executive" military powers must be placed in the same hands—that the President have unrestricted supervision over the manner in which the discretion involved in the administration of the military statutes be exercised. This is to be regarded as one phase of his power as Commander-in-Chief. In other words, that power may reasonably be taken to include the power of administrative supervision and hence of removal over the officer who administers the military and naval statutes of Congress. And since he derives this power directly from the Constitution, as an absolute power, Congress may no more make independent the officers set up to exercise discretion with reference to the execution of its statutes relative to the army and navy, than it may make independent the officers upon whom it places the duty of executing the President's orders under his exclusive powers as Commander-in-Chief.

No Difficulties in Other Situations. No difficulties appear in other overlaps of power. Thus Congress "can authorize agreements [with foreign states] within the field of its legislative powers." But although "a duty of negotiation is imposed upon the President," and he may be duty bound to seek an agreement the content of which conforms to the statute,¹⁶⁰ he may or may not consummate such

¹⁶⁰ Corwin, review of Willoughby on the Constitution, in *American Journal of International Law*, October, 1929, p. 908.

an agreement, and, in particular, only the President or agents removable by him can negotiate such an agreement.

Similarly, there is no difficulty in the fact that when Congress " repeals a treaty as law of the land, the President, as the organ of diplomatic intercourse, becomes constitutionally obliged to inform the other party to the treaty." ¹⁷⁰

" Congress is vested with the powers of any sovereign legislature in the international field." ¹⁷¹ And it may set up independent agencies to execute the statutory powers granted by statutes in this field which do not require negotiations: for example, its tariff laws, its immigration laws, and its other regulations of foreign commerce applicable only to American jurisdiction.

Although, " upon a declaration of war by Congress, he [the President] becomes obliged to exert his powers as commander-in-chief," ¹⁷² Congress cannot devolve these powers upon independent officers. His duty here is precisely to exercise his powers already possessed, and upon which Congress may not infringe, to the end that he and those whom he controls faithfully execute the law declaring a state of war.

Congress may by statute repeal a treaty, but cannot communicate the fact to a foreign state. Whether the President may, in his discretion, terminate any

¹⁷⁰ Ibid.

¹⁷¹ Ibid.

¹⁷² Ibid.

treaty,¹⁷³ and to what extent he may bind the nation by executive agreements not submitted to the Senate, need not here be considered. These questions do not affect our conclusions as to the absolute power of removal of officers through whom the President carries out such admittedly exclusive and absolute powers as he may have in the fields of foreign, military and naval affairs.

The Probabilities as to Future Cases. However, the proof of the pudding is in the eating. Hence, while we hope that our analysis will prove valuable, however future decisions may go, the immediate question is whether the Court will accept for future cases some such narrower interpretation of the Myers case and some such general theory of removals as we have set forth.¹⁷⁴

There are several considerations which suggest that our theory will not prevail. For one thing the Court is not apt to accept a rather complex theory, but, even if it limits the Myers *dicta* in the future cases, is more apt to say that these *dicta* just do not apply to the case in hand, for listed reasons. In reality, however, this will logically be a repudiation of the premises of that case; and our effort has been to present a "logical" form or dummy on which such repudiation might be hung.

¹⁷³ Cf. *ibid.*

¹⁷⁴ We have set forth this particular theory less in the expectation that the Court will accept it *as it stands* than by way of showing the basic aspects of constitutional problems of this type, the logical situation which they involve, and an enlightened technique for approach to them.

More serious is this: here was a vexed problem of far-reaching significance, never before authoritatively passed upon. After most careful consideration, including a reargument in which a distinguished lawyer from the Senate¹⁷⁵ represented the interests of that body as *amicus curiae*, the Court—six of the nine members¹⁷⁶—made their choice. They attempted to settle the question in its broader aspects in a carefully and elaborately reasoned opinion. The reaction of the two-thirds majority was distinctly favorable to the executive viewpoint.

The Court quoted the Myers reasoning with approval, apparently regarding it as established, in the case of Springer et al. v. Philippine Islands.¹⁷⁷ This indicates, at least superficially, the general acceptance as law of its broad premises.

Let us briefly examine the Springer case. It came up on a writ of certiorari to the Supreme Court of the Islands to review judgments ousting the petitioners from the offices of directors of certain government-owned corporations. In affirming the judgments, the Court held unconstitutional, under the Organic Act of the Islands, the acts of the territorial legislature which vested the election of directors of the government-owned stock in a board in one case and a committee in the other, both which bodies consisted of the Governor-General, the

¹⁷⁵ Senator Pepper, of Pennsylvania.

¹⁷⁶ The dissenters were Justices Brandeis, McReynolds and Holmes.

¹⁷⁷ 277 U. S. 189.

Speaker of the lower house, and the President of the upper house. This, it was said, vested in "legislative" officers the "executive" power of appointment, whereas, by the Organic Act, interpreted in the light of the American doctrine of the separation of powers, the executive power is vested in the Governor-General.

We should note in passing that the Court held the control of the stock to be "governmental," even though a "proprietary" rather than a "sovereign" function. It also held it to be neither "legislative" nor "judicial," and hence to be, by exclusion, "executive." As such, it may not be vested by law in an organ composed, in whole or in part, of "legislative" officers, especially since the Organic Act said all executive functions must be under the Governor General's supervision.

The decision that a power may be classed as "executive," and that a power so classed must be vested in executive officers only, is acceptable. The wording of the Organic Act may well lead to the conclusion that such a power must be placed under the Chief Executive. The Court, however, in the Myers opinion, failed to see that this is not required by the federal Constitution. It failed to see that the statutes may vest in independent executive officers other than the Chief Executive an executive power which they may not vest in legislative officers. It failed to see the possible basis for this distinction which we have found in the Constitution. Once this distinction is

clearly understood, it becomes evident that neither of these cases is in point with reference to the power of Congress to regulate the tenure of executive officers.

In a sense, however, the Springer opinion further indicates a trend of thought on the part of a majority of the Court that may, indeed, lead to future decisions in conformity with the *dicta*. For not only are *dicta* not always ticketed as such,¹⁷⁸ but they are often accepted in such a way as, after future cases have been decided, to become actually the law.¹⁷⁹ Courts often follow *dicta*, in short, as well as premises by which they are technically bound by *stare decisis*.

Let us now turn to the other side of the picture. In the Springer case, Mr. Justice Holmes and Mr. Justice Brandeis again dissented, while Mr. Justice McReynolds said: "A good reason lies behind this limitation [of legislative authority] which does not apply to our Federal or state governments. From the language employed, read in the light of all the circumstances, perhaps it is possible to spell out enough to overthrow the challenged statute. Beyond that it is not necessary to go." This indicates the determination of the minority of the Court to stand out against the *dicta* of the Myers case. The

¹⁷⁸ Cardozo, *Nature of the Judicial Process*, p. 30. On p. 21 Cardozo says: "Every judgment has a generative power. It begets in its own image."

¹⁷⁹ *Ibid.*

future cases may depend upon future changes in the personnel of the Court, a question upon which it is unsafe to predict.

The opinion in the Myers case which contains these broad *dicta* was written by an ex-President. It is in no spirit of disrespect for the Chief Justice that we suggest that he saw through executive-colored glasses. It is true that five of his brethren assented in this case. It is not, however, entirely improbable that, when the issue is clearly drawn with reference to other types of limitations on the removal power, and with reference to other types of officers, such as the Comptroller General or Interstate Commerce Commissioners, a majority, consisting of Holmes, Brandeis, and McReynolds, with two others, will at least give careful reconsideration to the new aspects of the problem therein presented. We may certainly venture to hope, if not to predict, that in such a crucial case the Court will begin to draw distinctions, whether or not these we have suggested. It is not altogether improbable that at least two more of his brethren will refuse to follow the Chief Justice, in such a clearly different case, in making his broad *dicta* the law of the land. This conclusion is supported by the fact that the Chief Justice's ideas on psychology and expediency run counter to generally accepted conclusions on public policy, and have been very ably criticized, not only in the dis-

senting opinions, but by distinguished scholars.¹⁸⁰ A Court that is becoming increasingly sensitive, despite occasional set-backs, to expert opinion outside the lawyers' briefs, may be expected to weigh very carefully the consequences of acceptance of the *Myers dicta* as law which this criticism has tended to make explicit. What it will decide in a case sharply different from the *Myers* case is at the very least not a foregone conclusion.

¹⁸⁰ Cf. Corwin, *The President's Removal Power*. On the value of such criticisms, see Beck, review of Morganston, *The Appointing and Removal Power of the President of the United States*, in *University of Pennsylvania Law Review*, January, 1930.

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